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In The

Supreme Court of the United States

RAYBESTOS PRODUCTS COMPANY,

Petitioner,

v.

THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Respondent.

On Petition For Writ Of Certiorari To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

GEORGE M. PLEWS
Counsel of Record
JEFFREY D. CLAFLIN
BRETT E. NELSON
PLEWS SHADLEY RACHER & BRAUN LLP
1346 N. Delaware St.
Indianapolis, IN 46202
(317) 637-0700

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Where the state induces a private citizen to enter into an agreed order in resolution of an environmental enforcement action, to give up the right to litigate the dispute, is the state's subsequent refusal to abide by the terms of that order a violation of the citizen's right to Due Process?

Where there is no effective mechanism for redress for the state's violation of the terms of an agreed order, is that a violation of the citizen's right to Due Process and a taking under the Fifth and Fourteenth Amendments to the Constitution of the United States?

CORPORATE DISCLOSURE STATEMENT

No publicly traded company owns more than 10% of Raybestos' stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATIONS FOR OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING CERTIORARI	11
I. DUE PROCESS REQUIRES STRICT ENFORCEMENT OF THE AGREED ORDER	11
II. DUE PROCESS REQUIRES A MEANINGFUL OPPORTUNITY TO SEEK AN EFFECTIVE REMEDY	17
III. IDEM'S DESTRUCTION OF THE AGREED ORDER IS A "TAKING" FOR WHICH RAYBESTOS IS ENTITLED TO COMPENSATION	24
CONCLUSION	30

APPENDIX

Opinion of the Indiana Supreme Court on transfer, filed December 9, 2008, reported at 897 N.E.2d 469 (Ind. 2008) ..... App. 1

TABLE OF CONTENTS – Continued

Page

July 6, 2004 summary judgment order, Marion County Superior Court (Cause No. 49D12-0209-PL-001553) ..... App. 18

Opinion of the Indiana Court of Appeals, filed November 15, 2007, reported at 876 N.E.2d 759 (Ind. Ct. App. 2007) ..... App. 25

October 30, 2006 Judgment Entry Regarding Additional Damages and Attorney Fees, Marion County Superior Court (Cause No. 49D12-0209-PL-001553) ..... App. 33

June 12, 2006 Judgment Entry, Marion County Superior Court (Cause No. 49D12-0209-PL-001553) ..... App. 42

June 1, 2001 Order on Petition for Review (Cause No. 49F12-0101-MI-00194) ..... App. 69

Opinion of the Indiana Supreme Court denying rehearing, filed March 31, 2009, reported at 903 N.E.2d 471 (Ind. 2009) ..... App. 83

U.S. Const. Amend. XIV, § 1 ..... App. 85

Ind. Code § 4-21.5-2 ..... App. 85

Ind. Code § 4-21.5-3 ..... App. 91

Ind. Code § 4-21.5-5 ..... App. 105

Ind. Code § 13-25-4 ..... App. 119

Ind. Code § 34-13-1-1 ..... App. 153

February 1997 Agreed Order ..... App. 154

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. United States, 364 U.S. 40 (1960) 28, 29

Ash v. Chandler, 530 N.E.2d 303 (Ind. Ct. App. 1988) 26

Burns v. City of Terre Haute, 744 N.E.2d 1038 (Ind. Ct. App. 2001) 27, 28

Campbell v. State, 284 N.E.2d 733 (1972) 27

Castle v. United States, 301 F.3d 1328 (Fed. Cir. 2002) 28

Entergy Arkansas, Inc. v. State of Nebraska, 226 F. Supp. 2d 1047 (D. Neb. 2002), *aff'd*, 358 F.3d 528 (8th Cir. 2004) 23

Franconia Associates v. United States, 536 U.S. 129 (2002) 26

General Elec. Co. v. Johnson, 362 F. Supp. 2d 327 (D.D.C. 2005) 22

Harmon Indus. v. Browner, 191 F.3d 894 (8th Cir. 1999) 16

Horowitz v. United States, 267 U.S. 456 (1925) 27

Hughes v. United States, 342 U.S. 353 (1952) 12, 13, 14

In re Estate of Moore, 714 N.E.2d 675 (Ind. Ct. App. 1999) 26

Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (2005) 26

TABLE OF AUTHORITIES – Continued

Page

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 17, 20

Lynch v. United States, 292 U.S. 571 (1934) 26

Marbury v. Madison, 5 U.S. 137 (1803) 24

McIntosh v. Melroe Co., a Div. of Clark Equip. Co., Inc., 729 N.E.2d 972 (Ind. 2000) 23

McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) 21, 22

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 25

State ex rel. Reichert v. Youngblood, 73 N.E.2d 174 (Ind. 1947) 23

United States v. Atlantic Refining Co., 360 U.S. 19 (1959) 13, 14

United States v. Armour & Co., 402 U.S. 673 (1971) 12, 13, 14

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 12

United States v. Smith, 94 U.S. 214 (1876) 26

United States v. Winstar Corp., 518 U.S. 839 (1996) 26, 27

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V 2, 25, 28

U.S. Const. amend. XIV, § 1 ..... 2, 17, 25

28 U.S.C. § 1257(a) 1

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 9607(c)(3) 20

40 C.F.R. § 761.120(c) 16

Ind. Code § 4-21.5-1-9 19

Ind. Code § 4-21.5-2-5 ..... 2, 9, 19, 27

Ind. Code § 4-21.5-3-4 ..... 2, 19

Ind. Code § 4-21.5-3-5 ..... 2, 19

Ind. Code § 4-21.5-3-6 ..... 2, 19

Ind. Code § 4-21.5-3-8 ..... 2, 19

Ind. Code § 4-21.5-5 ..... 2, 19

Ind. Code § 13-25-4 2

Ind. Code § 34-13-1-1 ..... 2, 10, 23, 25, 27

CITATIONS FOR OPINIONS BELOW

Petitioner Raybestos Products Company ("Raybestos") seeks review of the Opinion of the Indiana Supreme Court (App. 1-17) reported at 897 N.E.2d 469 (Ind. 2008). The Indiana Supreme Court denied Raybestos' petition for rehearing, except for the limited purpose of correcting a minor error in the opinion immaterial to this petition. The Indiana Supreme Court's opinion on rehearing (App. 83-84) is reported at 903 N.E.2d 471 (Ind. 2009). The Indiana Court of Appeals' opinion reversing the trial court's judgment in favor of Raybestos (App. 25-32) is reported at 876 N.E.2d 759 (Ind. Ct. App. 2007). The trial court's judgment entries (App. 33-68) and the trial court's order on petition for review (App. 69-82) were not reported, but are included in the appendix to this petition.

BASIS FOR JURISDICTION IN THIS COURT

The Indiana Supreme Court issued its Opinion on December 9, 2008 directing the trial court to vacate judgments in favor of petitioner Raybestos and to dismiss the action. Raybestos timely filed a petition for rehearing on January 8, 2009. The Indiana Supreme Court substantively denied Raybestos' petition for rehearing on March 31, 2009. This Court has jurisdiction, pursuant to 28 U.S.C. §1257(a), to review the final judgment of the highest court of a state upon a petition for writ of *certiorari*.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1.

Ind. Code §§ 4-21.5-2-5, 4-21.5-3-4, 4-21.5-3-5, 4-21.5-3-6, 4-21.5-3-8, 4-21.5-5, 13-25-4, 34-13-1-1.

STATEMENT OF THE CASE

This case raises the question of whether there is any effective remedy for Indiana citizens when the state environmental agency, the Indiana Department of Environmental Management ("IDEM"), subverts

an agreement it enters regarding the investigation and remediation of environmental contamination. IDEM changed its mind about the agreement it had made and – unwilling to seek change through the agreement's dispute resolution mechanism – set about inducing a reluctant EPA to force Raybestos to perform a cleanup different than the risk-based cleanup required by the agreement that IDEM and Raybestos previously negotiated. This case does not involve "overfiling" by the United States Environmental Protection Agency ("EPA") as a result of routine communications with IDEM or EPA's own, independent determination that the outcome of the state agreement would be inadequate. The Indiana Supreme Court's 2008 opinion leaves Raybestos and other Indiana citizens with no opportunity for redress when IDEM determines to renege on its agreements.

This case began in February 1997, with an Agreed Order settling a dispute between Raybestos and IDEM. The dispute concerned whether, and to what extent, Raybestos was responsible for the cleanup of polychlorinated biphenyls ("PCBs") in a drainage ditch (known as "Shelly Ditch") near Raybestos' Crawfordsville, Indiana plant. Raybestos did not agree it was solely or even partially responsible, but in order to avoid a lengthy dispute Raybestos entered into an Agreed Order with IDEM by which Raybestos agreed to perform a "risk-based" remediation. A risk-based cleanup's essential characteristic is that the cleanup is not to a pre-set or arbitrary level of cleanup, but to a level consistent with the actual risk

presented by the contaminant at the particular cleanup site. The Agreed Order included a dispute resolution mechanism. (App. 172-74.)

Raybestos submitted its risk assessment. After fifteen months of review and analysis by IDEM and its EPA-approved outside risk-assessment contractor, IDEM approved Raybestos' risk assessment. (App. 48, ¶13.) Raybestos then prepared a technical memorandum incorporating the findings of the risk assessment. (*Id.*, ¶14.) IDEM provided comments in response and suggested a "hot spot" removal. (*Id.*) Pursuant to IDEM's suggestion and a potential cleanup level set forth in the approved risk assessment, Raybestos then proposed a "hot spot" cleanup to remove all PCBs to a maximum remaining concentration of 238 parts per million ("ppm") in the worst areas (lower levels of PCBs would remain in all other areas). (*Id.*) However, IDEM's administration changed and IDEM abruptly "withdrew" its risk assessment approval and disapproved Raybestos' technical memorandum. (App. 19-20, 48, ¶14, 71-72.)

After providing IDEM with the required notice of dispute under the Agreed Order's dispute resolution procedures, Raybestos filed a petition for administrative review and, thereafter, its petition for judicial review in the Marion Superior Court. (*Id.*, 72-74.) On judicial review, the state court judge found that IDEM's withdrawal of the approval of the risk assessment and disapproval of the subsequent technical memorandum was arbitrary and capricious, unsupported by substantial evidence and had nothing to do

with the specifics of the risk assessment or any site-specific evidence. (*Id.*, 79.) Instead, the withdrawal was based upon a single consideration: IDEM did not want to set a "precedent" by allowing the "hot spot" level proposed by Raybestos. (*Id.*) On June 1, 2001, the state court held that Raybestos had been prejudiced by IDEM's breaches of the Agreed Order and ordered that IDEM reinstate approval of the risk assessment and approve the technical memorandum. (*Id.*, 81.) After Raybestos obtained an additional order compelling IDEM to act, IDEM ultimately sent a letter purporting to approve the technical memorandum and reinstate approval of the technical memorandum. (*Id.*, 59, ¶¶61-62.) However, IDEM refused to allow the cleanup it had agreed to under the Agreed Order.

IDEM did not appeal the trial court's order. (*Id.*, 5.) Instead, throughout the dispute resolution, administrative and judicial review processes, IDEM had mounted a planned, persistent campaign to use EPA to force a different cleanup. Ultimately, EPA proceeded to do just that, issuing a December 6, 2000 unilateral administrative order ("UAO") forcing Raybestos – through the threat of punitive damages in an amount up to three times the actual cleanup costs (State Ct. App. 4070 (UAO penalty provision)) – to conduct a cleanup to a uniform, arbitrary standard (10 ppm) that ultimately cost over $16 million more than the cleanup IDEM and Raybestos agreed to under the Agreed Order.

Raybestos filed suit against IDEM in Marion Superior Court on July 26, 2002, seeking damages for IDEM's breach of contract and declaratory relief regarding IDEM's liability for Raybestos' future damages. (App. 5, 42.) On July 6, 2004, the trial court, Honorable Robyn Moberly, granted, in part, Raybestos' motion for summary judgment. Judge Moberly held that the Agreed Order was a settlement agreement – a contract – and that IDEM's requests for EPA intervention to subvert the risk-based process IDEM had agreed to were a breach of contract. (*Id.*, 21, 23.) The trial court considered IDEM's statutory and program obligations to communicate with EPA, but found that its actions in this case were *not* ordinary-course communications required by National Contingency Plan ("NCP"), the Superfund Memorandum of Agreement ("SMOA") between IDEM and EPA, or other law. (*Id.*, 22.) Instead, it was uncontested that IDEM's communications with EPA were "to avoid the terms of the Agreed Order, which were binding on [IDEM]." (*Id.*, 23.) The trial court reserved for trial the questions of causation and damages. (*Id.*)

Following a six-day bench trial (*id.*, 44), on June 12, 2006, the trial court entered judgment in favor of Raybestos in the amount of $11,645,321.58, plus post-judgment interest. (*Id.*, 66-67.) At trial, IDEM presented evidence that it claimed showed that EPA's enforcement action resulted from IDEM's "legitimate" communications with EPA, including communications under the SMOA, rather than "illegitimate" communications intended to avoid IDEM's obligations under

the Agreed Order. (*Id.*, 59, ¶65; State Ct. App. 3096-3102.) The trial court weighed this evidence and found that "IDEM's communications to EPA regarding Shelly Ditch were not done in the ordinary course of business." (*Id.*, 59, ¶63.)

The trial court made numerous well supported factual findings on this issue. "IDEM was actively soliciting, encouraging and insisting on EPA involvement in the cleanup of the Raybestos/Shelly Ditch site." (*Id.*, 56, ¶47.) "IDEM mounted a planned, organized, persistent campaign to use EPA to force a different cleanup." (*Id.*, 59, ¶63.) "The EPA's enforcement action was not due to possible NPL ["National Priorities List"] listing of the Sugar Creek Sediment Site or any pre-breach communication by IDEM" (*Id.*, ¶64.) "IDEM argued that . . . [its] "legitimate" communication could have caused EPA enforcement. . . . However, there is no evidence supporting this speculation." (*Id.*, ¶65.)

"Independent action by EPA – that is, action not related to IDEM's improper solicitations – . . . was not a substantial factor in EPA's involvement in the Shelly Ditch cleanup." (*Id.*, 60, ¶67.)

> Although it is unknowable whether the EPA would have ever involved itself in the Shelly Ditch clean up, the evidence is voluminous and overwhelming that EPA would not have gotten involved in the clean up when it did or any time in the foreseeable future, but for the efforts of IDEM.

(*Id.*, 56-57, ¶47.) "There were reasons that the EPA could have or might have eventually initiated enforcement actions against the Plaintiff, but the Court is unconvinced that there was any other factor in the EPA's involvement other than the persistent insistence of IDEM." (*Id.*, 59, ¶62.)

> Raybestos was aware that EPA had the right to over-file to compel a more stringent clean-up than that proposed by Raybestos. Raybestos accepted the "risk" that the EPA would over-file when it signed the Agreed Order with IDEM. However, Raybestos did not accept the "risk" that IDEM would instigate, encourage, facilitate and insist upon the EPA over-filing.

(*Id.*, 54, ¶37.) Not one of these findings was reversed or even criticized on appeal.

Evidence related to Raybestos' post-September 20, 2003 damages and Raybestos' attorney fees was presented on September 8, 2006. (*Id.*, 33-34.) The trial court's October 30, 2006 judgment awarded Raybestos an additional $4,716,691.33. (*Id.*, 40.) IDEM appealed.

On November 15, 2007 the Indiana Court of Appeals issued a seven-page order reversing the trial court's 2004 grant of summary judgment on the issue of IDEM's breach of the Agreed Order. The court addressed almost none of the issues briefed by the parties. Its sole basis for reversal was a holding that IDEM lacked authority to approve Raybestos' cleanup and the Agreed Order was unenforceable as a matter

of public policy. IDEM had never made this claim. Raybestos petitioned for, and obtained, transfer to the Indiana Supreme Court, vacating the Court of Appeals' opinion.

In its December 9, 2008 opinion, the Indiana Supreme Court found that IDEM actually did have authority to enter into risk-based cleanups and held that the Agreed Order "is an agency action governed by [the Indiana Administrative Orders and Procedures Act ("AOPA")], not a contract that will support a claim for damages from IDEM." (App. 1.) Essential to its holding was the finding that "IDEM's communications with EPA are agency actions" subject to exclusive review under AOPA, which does not authorize money damages. (App. 10-11.) The Indiana Supreme Court noted that not all contract claims against state agencies for money damages are precluded by AOPA, citing an AOPA exemption for "contracts for the acquisition, leasing or disposition of property or the procurement of goods or services." (*Id.*, 12.) But the court ignored that other actions are exempt from AOPA, including "decision[s] to initiate or not to initiate an inspection, investigation, or other similar inquir[ies] that will be conducted by the agency [or] another agency" and "decision[s] concerning the conduct of an inspection, investigation, or other similar inquiries." Ind. Code §§ 4-21.5-2-5(9) & (10). IDEM's extraordinary efforts to induce the EPA to destroy the Agreed Order by instituting a second enforcement action fall within the plain language of these AOPA exemptions.

As noted by the Indiana Supreme Court, IDEM first argued that AOPA precluded Raybestos' claim for contract damages in its brief to the Indiana Court of Appeals. (App. 9.) However, IDEM's argument to the Indiana Court of Appeals was that the Agreed Order itself was an "agency action" and that Raybestos was required to seek judicial review or enforcement of the Agreed Order through AOPA. (Appellant's Br. at 20-21.) IDEM argued that Indiana courts are deprived of jurisdiction "when a party has an administrative remedy and fails to exhaust it." (*Id.*, 21.) In response, Raybestos noted in its Appellee's brief that it *had* sought judicial review and enforcement of the Agreed Order, had obtained the only relief possible under AOPA, had exhausted its administrative remedies and was now seeking damages, not judicial review. (Appellee's Br. at 26-28.) IDEM never argued that its communications with EPA in an effort to subvert the Agreed order were "agency actions" or that AOPA precluded a damage claim under the Indiana statute permitting such claims against the state.

The first suggestion that Raybestos had *no possible remedy* for IDEM's subversion of the Agreed Order was Indiana Supreme Court's December 9, 2008 order. That order confirmed that AOPA did not permit the award of money damages but also held that AOPA *precluded* Raybestos' claim under I.C. § 34-13-1-1(a), which permits contract claims against the state. Raybestos' first opportunity to address the assertion that Indiana law deprived it of any effective remedy at all was with its petition for rehearing.

Raybestos briefed the due process issues addressed in this petition in its petition for rehearing. (Pet. Reh'g at 9-13.) The Indiana Supreme Court denied Raybestos' petition for rehearing, other than to correct that court's misstatement regarding the standards applicable to administrative review.

REASONS FOR GRANTING CERTIORARI

I. DUE PROCESS REQUIRES STRICT ENFORCEMENT OF THE AGREED ORDER.

This Court has held that agreed orders or consent decrees between a state and a private citizen must be strictly and literally enforced, as written, because, by entering such orders or decrees, the citizen is giving up the fundamental due process right to litigate the dispute:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally

> opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. *Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.* (Emphasis added; footnote omitted.)

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 245 (1975).

The *Armour* Court cited *Hughes v. United States*, 342 U.S. 353 (1952), a case where "the Government sought to construe a consent decree that gave the defendant the option of selling his stock or putting it in a voting trust as requiring him to sell the stock within a reasonable time even though he chose the voting trust alternative, because the procompetitive purpose of the decree would otherwise be frustrated." *Armour*, 402 U.S. at 682.

> It may be true as the Government now contends that Hughes' large block of ownership

> in both types of companies endangers the independence of each. Evidence might show that the sale by Hughes is indispensable if competition is to be preserved. However, in section V the parties and the District Court provided their own detailed plan to neutralize the evils from such ownership. Whatever justification there may be now or hereafter for new terms that require a sale of Hughes' stock we think there is no fair support for reading that requirement into the language of section V.

Armour, 402 U.S. at 682 (quoting *Hughes,* 342 U.S. at 357); *see also United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959).

As was noted in the statement of the case, under the terms of the Agreed Order and the Scope of Work ("SOW") incorporated therein (App. 161, ¶28), Raybestos was to undertake a risk-based cleanup of the site. The cleanup would be governed by a technical memorandum incorporating the findings of the risk assessment. (*Id.*, 196-97.) It was intended to be a fully comprehensive cleanup, "to address human health and environmental concerns and bring the site to closure such that no further actions [would be] required." (*Id.*, 184.) Throughout this process, Raybestos worked closely with IDEM and its EPA-approved risk assessment contractor. *IDEM* proposed the "hot spot" removal. Raybestos then submitted the technical memorandum incorporating the hot spot removal, including a cleanup removing all PCBs to a maximum remaining concentration of 238 parts per

million in the worst areas. But then, IDEM's administration changed and it abruptly "withdrew" its risk assessment approval and disapproved Raybestos' technical memorandum. (App. 19-20, 48, ¶14, 71-72.)

On judicial review, the trial court held that the agency's withdrawal of the risk assessment and the disapproval of the technical memorandum was arbitrary and capricious. The judge ordered IDEM to reinstate the risk assessment and to approve the technical memorandum. IDEM did not appeal the ruling of the trial court. The agency was, at that point, bound by the Agreed Order, as enforced by a trial court judge, to allow Raybestos to proceed with the hot spot cleanup mandated by the technical memorandum. Unwilling, though, to abide by the Agreed Order and its dispute resolution process, IDEM already had concluded a successful secret campaign to convince EPA that it should step in to compel Raybestos to conduct a different and much more expensive cleanup than what was otherwise required under the Agreed Order. IDEM intentionally disrespected and disregarded the fundamental condition upon which Raybestos entered the Agreed Order – that there would be a risk-based cleanup governed by the results of the risk assessment – when it enlisted EPA to do what it then could not. Raybestos gave up its due process right to litigate its dispute with IDEM over responsibility for the cleanup of the alleged contamination in exchange for such a non-arbitrary, actual risk-based cleanup. Under *Armour, Hughes,* and *Atlantic Refining,* it does not matter that the

government later decided that the Agreed Order should be abandoned, even if that decision was arguably based on valid policy considerations. Due process required IDEM to abide by its agreement.

The Indiana Supreme Court dismissed this argument, finding that there was no promise in the Agreed Order that IDEM would not contact EPA, that EPA "overfilling" was a known risk that IDEM could not foreclose by its agreement with Raybestos, that there are "federal regulations requiring communication between the agencies," that the Agreed Order, "in the event of a conflict in the application of Federal, state or local laws," compels Raybestos to comply with the most stringent standards, and that IDEM had, in any event, reserved all "rights and defenses" in the Agreed Order. (App. 15-17.)

However, IDEM's promise, and its waiver of its "right" to beg EPA to intervene, was the Agreed Order itself. IDEM committed to a course of action, to "suspend its own enforcement efforts" (*id.*, 17), which included contacting EPA to demand a separate enforcement action in spite of the Agreed Order. IDEM's precise promise *was* expressly stated in paragraph 84 of the Agreed Order: "[n]othing in this order shall restrict the State of Indiana from seeking other appropriate relief to protect human health or the environment from pollution or contamination at or from this site *not addressed in this Order*." (*Id.*, 181, ¶84.) (Emphasis added.) IDEM asked EPA to intervene in precisely the same site and the same alleged contamination covered by the Agreed Order. There

could not be a clearer breach of IDEM's obligations under the Agreed Order.

Likewise, the Agreed Order was IDEM's commitment in writing to a risk-based cleanup rather than the arbitrary numerical standards ultimately imposed under EPA's unilateral order. There was no "conflict" with a more stringent law; EPA's regulations expressly allow such risk-based PCB cleanups. (App. 31 (citing 40 C.F.R. § 761.120(c)).) This was no overfiling in the normal sense, where EPA is concerned with state action or inaction and the efficacy of a proposed cleanup. *See Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (EPA initiated enforcement action seeking to impose a penalty for the same alleged violations that state agency and regulated entity addressed through a consent order which imposed no penalty.). EPA was not concerned with the Shelly Ditch cleanup until IDEM induced it to get involved; the Indiana Supreme Court accepted the trial court's factual finding that "EPA would not have acted absent IDEM's prodding." (*Id.*, 15.) Finally, the federal regulations cited by the Indiana Supreme Court requiring communication between the agencies (*id.*, 16) have nothing to do with specific enforcement actions or this case. "IDEM's communications to EPA regarding Shelly Ditch were not done in the ordinary course of business. IDEM mounted a planned, organized, persistent campaign to use EPA to force a different cleanup." (*Id.*, 59 ¶63.)

Both parties gave up rights in the Agreed Order. The general reservation of rights clause is limited by

IDEM's specific agreement to a risk-based, comprehensive cleanup and by its agreement to resolve any disputes through the dispute resolution mechanism of the Agreed Order. Raybestos gave up its right to litigate its dispute with IDEM when it entered into the Agreed Order. Raybestos was obligated to abide by the terms and conditions of that order; so was IDEM.

Indiana law provides a mechanism – a contract claim against the state – to protect citizens like Raybestos from deprivation of the property right to enforce a consent decree. The Indiana Supreme Court's eleventh-hour determination that this mechanism was not available leaves Raybestos and other Indiana citizens without any potential remedy for the state's deprivation of this property right, in violation of their due process rights under the Fourteenth Amendment.

II. DUE PROCESS REQUIRES A MEANINGFUL OPPORTUNITY TO SEEK AN EFFECTIVE REMEDY.

The Fourteenth Amendment requires "an opportunity . . . granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). Here, Raybestos had no meaningful opportunity to challenge IDEM's actions through AOPA, and – according to the Indiana Supreme Court – may not challenge IDEM's actions through a claim for contract damages. If the Indiana

Supreme Court's decision stands, there will be no opportunity for any Indiana citizen to challenge IDEM's efforts to make performance of the agreements it enters impossible.

The Indiana Supreme Court held that "IDEM's communications with EPA [are] agency action[s]" and that Raybestos' "claim is for failure to carry out an obligation under the Order not to communicate with EPA," and is thus a "failure to perform a duty, function or activity under [AOPA]." (App. 10.) It held that "pursuant to AOPA, exclusive jurisdiction to review the Agreed Order and IDEM's obligations and functions under the order lies in the administrative procedure provided by [AOPA]." (*Id.*, 11.)

However, Raybestos was not able to seek redress through AOPA for IDEM's efforts to subvert the Agreed Order through extraordinary communications to EPA because those communications were secret. IDEM did not provide notice to Raybestos that, for example, it prepared and internally distributed a September 22, 1998 memorandum outlining how it would involve EPA to defeat the Agreed Order (App. 50, ¶21) or that its Assistant Commissioner was asking EPA to take over the Shelly Ditch enforcement effort "on a weekly basis." (App. 56, ¶46). If these and other IDEM acts to destroy the Agreed Order were actually "agency actions" for which review was available under AOPA, IDEM would have been required to provide Raybestos with written notice describing the agency action and explaining the available procedures and time limits for administrative review. *See*

I.C. §§ 4-21.5-3-4, 4-21.5-3-5, 4-21.5-3-6, and 4-21.5-3-8 (requiring, *inter alia*, notice of "orders" which include "agency actions" that determine "the legal rights, duties . . . or other legal interests" of a person.)[1]

Even had IDEM provided notice to Raybestos of its illicit actions, a "claim against the State or its agency for damages is not among the available remedies" under AOPA. (App. 11.)[2] The only remedies available under AOPA are for the trial court to "remand the case to the agency for further proceedings" or to "compel agency action that has been unreasonably delayed or unlawfully withheld." I.C. § 4-21.5-5-15. This is the same relief Raybestos sought – and obtained – when it challenged IDEM's "withdrawal" of its approval of the risk assessment and disapproval of its technical memorandum. Of course, by the time Raybestos obtained the relief available under AOPA, IDEM had successfully destroyed the Agreed Order by inducing EPA to begin a separate enforcement action. IDEM refused to make any

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[1] *See* I.C. § 4-21.5-1-9 (defining "order").

[2] Raybestos could not have obtained review of IDEM's actions under AOPA in any event. IDEM's extraordinary efforts to evade its own Agreed Order are expressly exempted from AOPA as "decision[s] to initiate or not to initiate an inspection, investigation, or other similar inquir[ies] that will be conducted by the agency [or] another agency" and "decision[s] concerning the conduct of an inspection, investigation, or other similar inquiries." I.C. §§ 4-21.5-2-5(9) & (10). The Indiana Supreme Court did not address these exemptions.

efforts to regain control of the cleanup following Judge Keele's order on Raybestos' petition for review. (State Ct. App. 4099-4103 (Raybestos' October 26, 2001 letter requesting that IDEM petition EPA to reinstate IDEM as the "lead agency" directing the Shelly Ditch cleanup and IDEM's November 6, 2001 letter declining to do so.).)

That Raybestos ultimately successfully obtained judicial review of IDEM's improper "withdrawal" of the risk-assessment approval is no substitute for a meaningful remedy for IDEM's breaches of the Agreed Order. "[T]he Fourteenth Amendment [requires] an opportunity . . . granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." *Logan,* 455 U.S. at 437. IDEM's letter "agreeing" (after being compelled to do so) to "reinstate" Raybestos' risk assessment and approve Raybestos' technical memorandum was meaningless because IDEM already had made cleanup under the Agreed Order impossible. By December 2000, before the close of judicial review, EPA had already issued its order requiring Raybestos to clean up to a much more stringent level, under threat of treble damages. (App. 5.) *See also* 42 U.S.C. § 9607(c)(3) (authorizing "punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action").

The Indiana Supreme Court also held that "IDEM's communications with EPA are 'agency actions'" subject to exclusive review under AOPA and

that, unlike a claim for breach of a contract "for the acquisition, leasing or disposition of property or the procurement of goods or services," no exemption permits a claim under the statute that permits contract claims against the state. (App. 10-13.) If the Indiana Supreme Court's order stands, then Indiana's statutes deprive Raybestos – and the many other citizens[3] who enter agreed orders with IDEM – from any means to challenge IDEM when it reneges on its agreements. IDEM can make and break such agreements with impunity and Raybestos and other Indiana citizens will have no process at all; no opportunity to be heard, no remedy. The regulated community will surely be discouraged from making agreements that cannot be enforced.

There is, of course, a better answer. The availability of a post-deprivation claim for contract damages comports with due process by providing a meaningful opportunity for post-implementation review and redress. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 38 (1990) (where only remedy for unlawful tax is post-deprivation challenge to the collection of the tax, due process requires that "the State must provide taxpayers with not only a fair opportunity to challenge the accuracy and legal validity of their tax obligations, but also a clear and certain remedy."). This

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[3] IDEM represented to the Indiana courts that it enters into such agreed orders "on a daily basis." (*See* IDEM's December 18, 2006 *Appellant's Supplemental Case Summary* at 3).

Court explained that in tax cases, the "taxpayer pays under duress when he proffers a timely payment merely to avoid a serious disadvantage in the assertion of his legal rights should he withhold payment and await a state enforcement proceeding," and that this is further cause for there having to be an adequate post-deprivation remedy." *Id.*, 38 n.21. There is no difference between the taxpayer paying under duress and the person or company being regulated by any other administrative agency, where the full weight of the government and the threat of escalating enforcement actions similarly can be brought to bear.

Post-enforcement review is familiar in the environmental context. Many defendants in Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") enforcement actions have challenged the constitutionality of § 106 of that statute because it does not provide for any pre-enforcement review of EPA's actions. Courts addressing these claims have upheld the constitutionality of § 106, but only because the statute explicitly requires judicial review prior to the actual deprivation of a property interest. *E.g.*, *General Elec. Co. v. Johnson*, 362 F. Supp. 2d 327, 339 (D.D.C. 2005) ("The ability of the PRP to choose, under the language of the statute, whether to comply with a section 106 order is key. . . . [W]ere the [potentially responsible party] to be deprived of any meaningful choice to refuse to comply with an order, that might pose a different situation in assessing whether a deprivation of property has occurred.").

Here, Raybestos was completely deprived of any pre-enforcement or post-enforcement remedy. IDEM failed to provide notice of its improper communications with EPA and the Indiana Supreme Court held that the trial court did not have jurisdiction to hear Raybestos' claim. The only remedy that Raybestos was left with – specific performance of the Agreed Order – was no longer available. Raybestos thus never had a chance to challenge the agency's action, either before or after it was deprived of its property interest. Because Raybestos could not challenge IDEM's destruction of the Agreed Order through AOPA or insist upon specific performance where performance was made impossible by IDEM, a claim for damages is the only remaining remedy. Such a remedy is provided for in Indiana's Contract Claim Statute, I.C. § 34-13-1-1(a). Effective damage remedies for governmental undermining of the agreements it makes are vital to keeping government conduct within lawful bounds. *Entergy Arkansas, Inc. v. State of Nebraska*, 226 F. Supp. 2d 1047, 1161 (D. Neb. 2002), *aff'd*, 358 F.3d 528 (8th Cir. 2004).

The right to a remedy is a basic tenet of law in a just society. Its roots can be found in the Magna Carta: "To no one will we sell, to no one will we deny, or delay right or justice." *McIntosh v. Melroe Co., a Div. of Clark Equip. Co., Inc.*, 729 N.E.2d 972, 987 (Ind. 2000). Under Indiana law, "[i]t has always been a general principle under our legal system that for every wrong there should be a remedy." *State ex rel. Reichert v. Youngblood,* 73 N.E.2d 174, 179 (Ind.

1947). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

III. IDEM'S DESTRUCTION OF THE AGREED ORDER IS A "TAKING" FOR WHICH RAYBESTOS IS ENTITLED TO COMPENSATION.

Raybestos' theory of the case in the lower courts was based on IDEM's breach of contract. After a six day bench trial, the trial court found that EPA would not have initiated an enforcement action against Raybestos but for IDEM's extraordinary and unlawful effort to compel the federal agency to intervene, and that IDEM's action were, thus, a breach of the Agreed Order, a breach entitling Raybestos to millions of dollars in damages.

The Indiana Supreme Court did not hold that the Agreed Order was not a contract or that IDEM did not breach the contract, only that the Agreed Order was "not a contract that will support a claim for damages from IDEM." (App. 1.) The Court reasoned that this was so because Raybestos' exclusive remedy was under AOPA, which does not provide for the recovery of damages, and because the state statute allowing for breach of contract actions against the

state did not apply because the Agreed Order was not a contract for goods or services.[4]

If the Indiana Supreme Court's Opinion is allowed to stand, then Raybestos will have suffered a breach of contract at the hands of a state agency, one costing Raybestos millions of dollars, for which there is no remedy whatsoever. The combination of these actions has resulted in a taking of Raybestos' property by the State of Indiana in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States, a taking that entitles Raybestos either to "just compensation," if not contract damages.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." "The Takings Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

In Indiana, as in most jurisdictions, an agreed order or consent decree "is both contractual, in that it

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[4] Ind. Code § 34-13-1-1(a) does not, as suggested by the Indiana Supreme Court, limit contract claims against the state to those contracts that meet the formality requirements for the purchase of goods or services by an administrative agency pursuant to Title 4. To the contrary, section 34-13-1-1(a) expressly allows contract claims for breaches of *implied* contracts that could not meet Title 4's formality requirements.

is an agreement between the parties, and an entry of judgment by the court." *In re Estate of Moore*, 714, N.E.2d 675, 678 (Ind. Ct. App. 1999); *Ash v. Chandler*, 530 N.E.2d 303, 306 (Ind. Ct. App. 1988). "Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch v. United States*, 292 U.S. 571, 579 (1934).

It has long been the rule that government can be held accountable for a breach of contract. *United States v. Smith*, 94 U.S. 214 (1876). "When the [government] enters into contracts its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Franconia Associates v. United States*, 536 U.S. 129, 141 (2002) (concerning contracts with the United States). With government contracts, as with private contracts, "damages are always the default remedy for breach of contract." *United States v. Winstar Corp.*, 518 U.S. 839 (1996), *see also* Justice Scalia's concurring opinion, 518 U.S. at 919 ("Virtually *every* contract operates, not as a guarantee of a particular future conduct, but as an assumption of liability in the event of nonperformance: The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else.") (citations omitted).

There is an exception under the "sovereign acts doctrine," where the act is "public and general," that can protect the government from contract liability. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl.

504, 536 (2005) (citing *Horowitz v. United States*, 267 U.S. 456 (1925) and *Winstar*, 518 U.S. at 893-96). But an act of government will be considered to be sovereign so long as its impact on a contract is "merely incidental to the accomplishment of a broader governmental objective." *Id.* Moreover, an act will not be held to be "public and general if it has the substantial effect of releasing the Government from its contractual obligations." *Winstar*, 518 U.S. at 899.[5] Consequently, to decide whether a taking has

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[5] At one time, American states had recognized the principle of sovereign immunity, that is: suit could not be maintained against a state without its consent. *E.g.*, *Burns v. City of Terre Haute*, 744 N.E.2d 1038, 1040 (Ind. Ct. App. 2001) (citation omitted). However, "[i]n 1972, [the Indiana] supreme court abolished the doctrine of sovereign immunity." *Id.* (citing *Campbell v. State*, 284 N.E.2d 733, 737 (Ind. 1972).) The *Campbell* court then explained that, with some exceptions not relevant here, "the legislature was responsible for considering which instances of governmental conduct should be immunized from liability." *Id.* Indiana's legislature has not subsequently created immunity for contract claims against the state or state agencies.

The Indiana Contract Claims Act, I.C. § 34-13-1-1 through 7, was recodified in 1998 by P.L.1-1998, SEC. 8. The Act includes a ten year statute of limitations, but otherwise does not exclude claims or immunize governmental conduct. The AOPA exemptions set forth in I.C. § 4-21.5-2-5 – including the exemptions for "contracts for the acquisition, leasing or disposition of property or the procurement of goods or services" cited by the Indiana Supreme Court (App. 12) and exemptions for "decision[s] to initiate or not to initiate an inspection, investigation, or other similar inquir[ies] that will be conducted by the agency [or] another agency" and "decision[s] concerning the conduct of an inspection, investigation, or other similar inquiries" (I.C. §§ 4-21.5-2-5(9) & (10)) – were added to the Indiana code in 1986.

(Continued on following page)

occurred with respect to a government contract, the courts must decide whether there is some basis upon which the state can rely on the sovereign acts doctrine and whether there would otherwise be a "full range of remedies associated with the vindication of a contract." *Castle v. United States,* 301 F.3d 1328, 1332 (Fed. Cir. 2002).

This Court has held that the destruction of contractual rights is a compensable taking under the Fifth Amendment. In *Armstrong v. United States*, 364 U.S. 40 (1960), materialmen had liens on vessels seized by the United States pursuant to the terms of the contract with the general contractor. Once the government seized the vessels, it claimed that the materialmen had no right to enforce their liens against the government. This Court held that there was a taking of the liens for which just compensation was due under the Fifth Amendment: "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking'

P.L.18-1986, SEC.1. Because the creation of sovereign immunity is in derogation of Indiana common law, exceptions to governmental liability "must be strictly construed against limitations on the claimant's right to bring suit." *Burns*, 744 N.E.2d at 1040 (citation omitted). The Indiana Supreme Court's expansive interpretation of AOPA to preclude Raybestos' claim is in derogation of Indiana common law, which abolished sovereign immunity, and results in a deprivation of due process for Raybestos and any other Indiana citizen who is injured by the state's breach of the agreed orders it enters.

and is not a mere 'consequential incidence' of a valid regulatory measure." 364 U.S. at 48.

Here, IDEM was not promulgating regulations or taking any action generally applicable when it secretly begged EPA to intervene and destroy the particular contract that IDEM had made with Raybestos. IDEM's actions were directed solely at Raybestos, and the effect of those actions on the contract was anything but "incidental." Those actions made the Agreed Order and Raybestos' decision to forego litigation worthless. Moreover, with no opportunity for injunctive relief and no right to recover damages arising from IDEM's breach – the "default remedy" in all breach of contract cases – Raybestos has been denied all of the "remedies associated with the vindication of a contract." IDEM's breach and the Indiana Supreme Court's subsequent decision that the breach should be uncompensated have worked a taking of substantial proportions, one that requires just compensation, compensation that was fairly measured by the trial court when it awarded damages.

CONCLUSION

For the foregoing reasons, Raybestos respectfully asks that the Court grant its petition for a Writ of Certiorari, reverse the opinion of the Indiana Supreme Court, and affirm the trial court's judgments.

DATED: June 29, 2009

Respectfully submitted,

GEORGE M. PLEWS
Counsel of Record
JEFFREY D. CLAFLIN
BRETT E. NELSON
PLEWS SHADLEY RACHER
& BRAUN LLP
1346 N. Delaware St.
Indianapolis, IN 46202
(317) 637-0700

Attorneys for petitioner,
Raybestos Products Company

897 N.E.2d 469

Supreme Court of Indiana.

THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Appellant (Defendant below),

v.

RAYBESTOS PRODUCTS COMPANY,
Appellee (Plaintiff below).

No. 49S02-0804-CV-183.

Dec. 9, 2008.

Steve Carter, Attorney General of Indiana, David L. Steiner, Frances H. Barrow, Timothy J. Junk, Deputy Attorney Generals, Indianapolis, IN, Attorneys for Appellant.

George M. Plews, Brett E. Nelson, Indianapolis, IN, Attorneys for Appellee.

On Petition to Transfer from the Indiana Court of Appeals, No. 49A02-0609-CV-782.

BOEHM, Justice.

We hold that an agreed order for environmental cleanup with the Indiana Department of Environmental Management ("IDEM") is an agency action governed by the Indiana Administrative Orders and Procedures Act, not a contract that will support a claim for damages from IDEM. We also hold that IDEM has authority to approve risk-based cleanups,

and IDEM's communications with the federal Environmental Protection Agency did not violate its Agreed Order with Raybestos.

Facts and Procedural History

Raybestos Products Company manufactures brakes and clutches in its Crawfordsville, Indiana plant. This plant is adjacent to Shelly Ditch, a 5000-foot open earthen drain surrounded by homes, a school, fairgrounds, and a community swimming pool. In 1995, IDEM identified polychlorinated biphenyls ("PCBs") in Shelly Ditch and notified Raybestos of its findings. Raybestos investigated internally and learned that in the late 1960s its corporate predecessor had used hydraulic oil containing PCBs. Some of this oil spilled and was pumped to a culvert which discharged into Shelly Ditch.

In 1996, IDEM sent Raybestos a "Special Notice of Potential Liability" for cleanup of Shelly Ditch, and began negotiating a cleanup plan with Raybestos. IDEM also notified the federal Environmental Protection Agency ("EPA") of its findings. IDEM recommended that Shelly Ditch receive a high priority in the Superfund Hazard Ranking System, but because of IDEM's ongoing negotiations, EPA initially assigned the site a low priority.

A December 1996 Statement of Work outlined a plan to "address human health and environmental concerns and bring the site to closure such that no future actions are required." The Statement of Work

called for Raybestos to prepare a Risk Assessment for IDEM's approval. In February 1997, IDEM and Raybestos entered an Agreed Order approved by IDEM's Commissioner incorporating the Statement of Work and requiring Raybestos to remove and dispose of PCBs in Shelly Ditch. Raybestos submitted a Risk Assessment which concluded that the PCB levels in Shelly Ditch posed no human health risks. After review by IDEM staff and an outside risk assessment contractor, IDEM approved the Risk Assessment in March 1998. Neither the Agreed Order nor the Risk Assessment contained a numerical cleanup level.

In May 1998, based on the approved Risk Assessment, Raybestos submitted a Technical Memorandum proposing no removal of PCBs from Shelly Ditch. Two months later, IDEM commented on the proposal and suggested that Raybestos consider a "hot spot" removal, in which high-level areas are cleaned to a specified level but the site is not cleaned to a uniform level.

In late August 1998, IDEM's Commissioner, a successor to the Commissioner who signed the Agreed Order, visited Crawfordsville and publicly promised residents that Shelly Ditch would be cleaned up promptly. On August 25, 1998, the U.S. Fish and Wildlife Service identified Shelly Ditch as within the range of the Indiana bat and the bald eagle, at the time respectively endangered and threatened species.

At some point, IDEM determined that the Risk Assessment had been approved in error, and an

internal memorandum in September 1998 explored possible ways to require a more stringent cleanup level, including involving EPA. At about the same time, Raybestos proposed a cleanup that would allow hot spots to contain PCB concentrations up to 238 parts per million ("ppm"). IDEM responded that this proposal was unacceptable, and in November 1998, IDEM withdrew its approval of the Risk Assessment and disapproved the Technical Memorandum.

Raybestos filed a Petition for Administrative Review in the Office of Environmental Adjudication. IDEM and Raybestos stipulated that the Agreed Order provision in which Raybestos agreed to "waive its right to administrative review of this Order" had "no effect on the proceedings." Despite the parties' stipulation, the Administrative Law Judge dismissed Raybestos's petition for review, finding as a matter of law that Raybestos had waived its right to review of IDEM's actions.

Raybestos then sought judicial review of IDEM's actions in the Marion Superior Court frequently referred to as the "Environmental Court." The Environmental Court first concluded that the parties' stipulation bound the Administrative Law Judge to permit review. The Environmental Court then determined that IDEM lacked authority under the Agreed Order to withdraw approval of the Risk Assessment and that IDEM's decision to withdraw approval was "arbitrary and capricious" and "not supported by any substantial evidence." The Environmental Court found that IDEM's only reason for withdrawing

approval was to avoid setting a precedent for the cleanup level proposed by Raybestos, and ordered IDEM to reinstate its approval of the Risk Assessment and to approve the Technical Memorandum. IDEM did not appeal that judgment, and reinstated the Risk Assessment and approved the Technical Memorandum.

Meanwhile, beginning in October 1998, IDEM urged EPA to require a more complete cleanup, and in December 2000, EPA issued a Unilateral Agreed Order ("UAO") requiring Raybestos to clean up Shelly Ditch to a level of no greater than 10 ppm PCBs. This cleanup was substantially more expensive than a 238 ppm hot spot cleanup.

In July 2002, Raybestos filed the complaint initiating this lawsuit in Marion Superior Civil Division, claiming breach of contract by IDEM. Raybestos alleged that the Agreed Order constituted a contract that IDEM breached by withdrawing approval of the Risk Assessment, disapproving the Technical Memorandum, and requesting EPA involvement in ordering a more stringent cleanup. Raybestos sought damages and a declaratory judgment that IDEM is liable for any future expenses incurred in remediating Shelly Ditch beyond what was required by the 1997 Agreed Order.

IDEM moved to dismiss under Trial Rules 12(B)(1) and 12(B)(6), asserting that (1) the trial court lacked subject matter jurisdiction, (2) any damages were caused by EPA, (3) IDEM did not

breach the Agreed Order, and (4) the Agreed Order is not a contract enforceable by a claim for damages. Raybestos moved for summary judgment, contending that the Environmental Court's order established IDEM's breach and that IDEM had admitted the breach. The trial court granted partial summary judgment for Raybestos, concluding that as a matter of law, IDEM's communications with EPA breached the Agreed Order and IDEM's right or obligation to seek EPA enforcement under some circumstances did not justify the breach. The trial court certified its partial summary judgment order for interlocutory appeal, but the Court of Appeals denied IDEM's request to accept an interlocutory appeal.

Damages from the alleged breach then proceeded to a bench trial. On June 12, 2006, the trial court entered its findings of fact, conclusions of law, and partial judgment. The trial court found that EPA's enforcement action was due solely to "IDEM's persistent and repeated requests" that EPA address Shelly Ditch, and entered a partial judgment for $11,645,321.58 – the difference between the cost of the EPA-required cleanup and the projected costs of a cleanup to 238 ppm – plus post-judgment interest at the statutory rate. IDEM appealed this order and the trial court's previous partial grant of summary judgment. On October 30, 2006, after hearing additional evidence, the trial court entered an additional award of $4,716,691.33 representing future cleanup costs and attorney fees. IDEM also appealed this order, and the Court of Appeals consolidated the two appeals.

The Court of Appeals reversed, holding that even if the Agreed Order were a contract, it would be unenforceable as "contrary to public policy" because a cleanup level of 238 ppm is twenty times the level allowed by federal regulations. *Ind. Dep't of Envtl. Mgmt. v. Raybestos Prods. Co.*, 876 N.E.2d 759, 763 (Ind.Ct.App.2007). We granted transfer.

We hold that the Agreed Order is not a contract that will support a claim for damages. For the reasons explained below, we do not agree that IDEM violated the order by communicating with EPA, or that IDEM's original agreement to a less stringent cleanup than EPA regulations prescribe would necessarily contravene public policy.

Standards of Review

IDEM appeals the trial court's denial of the motion to dismiss, partial grant and partial denial of summary judgment, and judgment entries dated June 12, 2006 and October 30, 2006 containing findings of fact and conclusions of law. To the extent they involve only legal issues, we review the trial court's orders de novo. *Charter One Mortgage Corp. v. Condra*, 865 N.E.2d 602, 604 (Ind.2007); *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 531 (Ind.2006). We uphold the trial court's findings of fact unless they are clearly erroneous. Ind. Trial Rule 52(A).

I. Damages for Breach of the Agreed Order

Raybestos seeks damages under Indiana Code section 34-13-1-1 (2004), which permits claims against the state arising out of express or implied contracts. IDEM responds that Raybestos may not bring a contract action for two reasons: (1) the Agreed Order is an agency action that is subject to challenge only under the Indiana Administrative Orders and Procedures Act ("AOPA"), I.C. §§ 4-21.5-1-1 to -7-9 (2004), and (2) the Agreed Order fails to meet the statutory requirements for a state agency contract. For the reasons explained below, we agree with IDEM and hold that the Agreed Order is not a contract that will support a claim for damages against the State.[1]

A. *Indiana Administrative Orders and Procedures Act*

AOPA "establishes the exclusive means for judicial review of an agency action." *Id.* § 4-21.5-5-1. AOPA exempts several agencies and agency actions from this provision, but neither IDEM nor the Agreed Order is among them. Ind.Code Ann. §§ 4-21.5-2-4, -5 (West Supp.2008). Accordingly, if IDEM is an agency

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[1] Because we hold that the Agreed Order is not a contract, we do not address Raybestos's arguments that rely on application or extension of private contract doctrine: that IDEM breached a contract by preventing Raybestos's performance, and that for at least government contracts, we should impose a general duty of good faith and fair dealing.

and the Agreed Order is an agency action, AOPA is the exclusive means to review the order.

As a preliminary matter, we address whether IDEM has preserved its claim that AOPA limits the remedies available to Raybestos. IDEM argued before the trial court that the Agreed Order is not enforceable by a claim for damages, but IDEM appears to have framed this argument specifically in terms of AOPA for the first time in its brief to the Court of Appeals. Generally, an appellate court will not review an issue that was not presented to the trial court. *Cavens v. Zaberdac,* 849 N.E.2d 526, 533 (Ind.2006). Raybestos briefed the issue and does not contend that IDEM waived the issue of whether AOPA precludes a claim for breach of contract. In any event, the issue challenges the jurisdiction of the trial court, and for this reason we address it. *See State Bd. of Tax Comm'rs v. Ispat Inland, Inc.,* 784 N.E.2d 477, 482 (Ind.2003) ("Under Indiana law, if a party is required by the Administrative Orders and Procedures Act to exhaust its administrative remedies before an agency prior to obtaining judicial review of the agency decision, courts are completely ousted of subject matter jurisdiction to hear the case at all."); *Town Council of New Harmony v. Parker,* 726 N.E.2d 1217, 1223 n. 8 (Ind.2000) (lack of subject matter jurisdiction cannot be waived).

IDEM is plainly an "agency" as defined by Indiana Code section 4-21.5-1-3, and the Agreed Order was an action by its Commissioner. AOPA defines "agency action" as "the whole or part of an order,"

"the failure to issue an order," or "[a]n agency's performance of, or failure to perform, any other duty, function, or activity under this article." I.C. § 4-21.5-1-4. Both the Agreed Order – an administrative order entered pursuant to section 13-25-4-23 – and IDEM's communications with EPA are agency actions. If we view this claim as one for failure to comply with an implied provision of the Order, it seeks relief from an agency action because the order itself is by definition an "agency action." If on the other hand the claim is for failure to carry out an obligation under the Order not to communicate with EPA, it is for "failure to perform" a "duty, function, or activity under this article." Indeed, communication with EPA on enforcement matters and appropriate remedies is a duty or function mandated by federal law. *E.g.,* 40 C.F.R. §§ 300.505 (2008) (requiring detailed annual consultation about activities), 300.515 (requiring communication about remedy selection); *see also* Superfund Memorandum of Agreement Between the State of Indiana and the United States Environmental Protection Agency Region V (1992) (outlining agencies' agreement to communicate regularly, include each other in settlement agreements, and permit changes in lead agency status).

Pursuant to a statute specifically addressing review of IDEM's actions, the exclusive means for review of an agency action of the IDEM Commissioner is by petition to the Office of Environmental Adjudication. I.C. § 4-21.5-7-3. That administrative body must grant relief to a party who has been

prejudiced by agency action that is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence." *Id.* § 4-21.5-5-14. The forms of relief available are to "set aside an agency action and: (1) remand the case to the agency for further proceedings; or (2) compel agency action that has been unreasonably delayed or unlawfully withheld." *Id.* § 4-21.5-5-15. Money damages are not authorized, presumably reflecting the General Assembly's policy judgment that specific performance is a more appropriate remedy for agency error than a damages award ultimately borne by the taxpayers.

In sum, pursuant to AOPA, exclusive jurisdiction to review the Agreed Order and IDEM's obligations and functions under the order lies in the administrative procedure provided by these statutes, and a claim against the State or its agency for damages is not among the available remedies.

B. *Contract Claims Against State Agencies*

Raybestos contends that statutory provisions other than AOPA authorize its claim. Specifically, Raybestos points to Indiana Code section 34-13-1-1(a), which allows claims against the State for breaches of both express and implied contracts. Raybestos essentially contends that this provision overrides the exclusive jurisdiction provision of AOPA. We think these statutory provisions are not inconsistent and collectively demonstrate that Raybestos's

claim is not well founded. Rather than apparently inconsistent provisions, AOPA and the statutes governing state contracts fit nicely together.

AOPA does not completely foreclose contract claims against state agencies. For example, exempted from AOPA's coverage are agency contracts for the acquisition, leasing, or disposition of property, or the procurement of goods or services. Ind.Code Ann. § 4-21.5-2-5(11) (West Supp.2008). This exemption mirrors the provisions found in Indiana Code sections 4-13-2-14.1 and 4-13-2-14.2, which require contracts with state agencies to be in writing and approved by the Commissioner of the Indiana Department of Administration, the Director of the Indiana State Budget Agency, and the Attorney General. IDEM asserts that the Agreed Order does not meet these requirements, and Raybestos concedes this point but responds that the requirements do not apply to its claim because these formalities apply only to contracts for purchases of goods or services. Raybestos argues that the limited application of these requirements to contracts for goods or services is shown by their placement in a chapter labeled "Administrative Management of State Services, Employees, Purchases, and Property." To the extent Raybestos argues that the chapter name requires a particular interpretation, the General Assembly has instructed that the descriptive headings of titles, articles, and chapters "are intended for organizational purposes only and are not intended to affect the meaning, application or construction of the statute they

precede." I.C. § 1-1-1-5(f). But assuming these requirements apply only to contracts for goods or services, this merely reflects the point that the very same contracts are exempted from the exclusive judicial review provisions. In other words, presumably because a contract for the purchase of goods or services will support a claim for damages, it is exempted from the exclusive jurisdiction provision of AOPA. Raybestos concedes the Agreed Order is not such a contract. It therefore is not exempted from AOPA.

II. IDEM's Authority to Approve Risk-Based Cleanups

Because we hold that under AOPA the Agreed Order does not support a claim for damages, we need not decide whether public policy precludes the construction of the Agreed Order urged by Raybestos. However, because the Court of Appeals reversed the trial court's judgment on this issue, we briefly turn to IDEM's authority to order risk-based cleanups, cleanups above or below the numerical level set by regulation.[2] The Court of Appeals concluded that IDEM

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[2] Raybestos argues that the Environmental Court order precludes IDEM from claiming that it lacked authority to approve a cleanup that did not reduce PCBs to 10 ppm. The order concluded that IDEM lacked authority to withdraw the Risk Assessment. It did not specifically address whether IDEM had authority to approve a cleanup above 10 ppm.

In any event, claim preclusion applies only when the party against which it will be applied had a full and fair opportunity

(Continued on following page)

lacked authority to approve a cleanup level that did not meet the applicable federal standard of 10 ppm. For this conclusion, the Court of Appeals relied on the federal PCB Spill Cleanup Policy, 40 C.F.R. §§ 761.120-761.135 (2008), which provides that "[s]oil contaminated by the spill will be decontaminated to 10 ppm." *Id.* § 761.125(c)(4)(v). Even if applicable to this cleanup,[3] that policy also gives EPA "flexibility to allow less stringent or alternative decontamination measures based upon site-specific considerations."[4]

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to litigate the issues or when application would be unfair given the circumstances. *Tofany v. NBS Imaging Sys., Inc.*, 616 N.E.2d 1034, 1038 (Ind.1993) (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)). It would be unfair to preclude IDEM from arguing its authority because the previous action was for administrative relief, not money damages, and by that time EPA had already ordered a more stringent cleanup. *Id.* ("[U]nfairness to the defendant against whom an estoppel is asserted may result . . . where the defendant had little incentive to vigorously litigate the first action either because the damages were small or nominal, or because future suits were not foreseeable." (quoting *Parklane Hosiery*, 439 U.S. at 330-31)).

[3] The parties dispute whether the 10 ppm standard applies to Shelly Ditch. That standard does not apply to pre-1987 spills, 40 C.F.R. § 761.120(a)(1), and the parties dispute whether the spill occurred in the late 1960s or continuously through 1996.

[4] This federal PCB Spill Cleanup Policy has been incorporated by reference in the Indiana Administrative Code, 329 I.A.C. 4.1-5-1 (2000), and provides IDEM the same flexibility afforded to EPA by federal regulation. This policy was promulgated as part of the solid waste management regulations, which the IDEM Commissioner can enforce by lawsuit or agreed order. I.C. §§ 13-14-2-6, -20-15-7, -30-3-3. We do not address whether it

(Continued on following page)

Id. § 761.120(c). We agree with Raybestos that the policy therefore does not constrain IDEM from agreeing to less stringent measures.

III. IDEM's Actions Did Not Violate the Agreed Order

We respectfully disagree with the trial court's conclusion that money damages are necessary to further the "interest in the government abiding by its promises" which facilitates cleanup agreements. Our holding today does not remove the incentive to enter into voluntary cleanup agreements with IDEM. If IDEM unjustifiably violates an agreement or acts arbitrarily, its performance can be compelled – as Raybestos demonstrated by seeking judicial review of IDEM's withdrawal of approval of the Risk Assessment.

On the other hand, the public interest is not served by enforcing promises that were never made. We accept the trial court's finding that EPA would not have acted absent IDEM's prodding, and we recognize the practical difficulties EPA's intervention caused Raybestos. For better or worse, federal "overfiling" – EPA's initiation of a cleanup after a state has brought an enforcement action – is a risk known to parties

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applies to this action instituted under the Hazardous Substances Response Trust Fund provisions, *id.* §§ 13-25-4-1 to -28.

negotiating a cleanup with a state agency.[5] If Raybestos wished to foreclose EPA action, it needed to deal with EPA. At no time did IDEM promise not to involve EPA. The Agreed Order does not purport to forbid IDEM's communication with EPA, and IDEM could not bind itself to fail to carry out its statutory obligations, including compliance with the federal regulations requiring communication between the agencies. *E.g.*, 40 C.F.R. §§ 300.505 (2008) (requiring detailed annual consultation about activities), 300.515 (requiring communication about remedy selection). Moreover, the Agreed Order itself acknowledged the potential applicability of federal authority and directs compliance with the most stringent cleanup requirements: "In the event of a conflict in the application of Federal, state, or local laws, ordinances and

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[6] *See* Clifford Rechtschaffen & David L. Markell, *Reinventing Environmental Enforcement and the State / Federal Relationship* 109-11 (2003) (describing a judicial split on the issue of whether EPA has authority to overfile, with most courts holding that overfiling is appropriate); Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 Harv. Envtl. L.Rev. 7, 14 (1990) ("After an overfiling, the regulated entities quite understandably become concerned that, without involving EPA, they cannot be sure a compliance schedule or a penalty amount agreed to by a state is final."); Christopher J. Redd, Comment, *The Adversarial Relationship Between the States and EPA: Conflict Over State Authority Under CERCLA*, 3 Dick. J. Envtl. L. & Pol'y 101, 105 (1993) ("From the perspective of a responsible party, settlement with state officials does not necessarily represent the end of the matter, or the limit of their liability.").

regulations, [Raybestos] shall comply with the most stringent of said laws, ordinances, or regulations, unless provided otherwise in writing by IDEM." Finally, the Agreed Order provides that "IDEM and [Raybestos] reserve all rights and defenses they may have pursuant to any available legal authority unless expressly waived herein." In short, IDEM did not and could not waive its authority to communicate with EPA, and did not commit to do more than suspend its own enforcement efforts.

Conclusion

Because the Agreed Order does not support a claim for damages and was not violated by IDEM's actions, the trial court's orders denying IDEM's motions to dismiss and for summary judgment are reversed. This case is remanded with instructions to vacate the judgments in favor of Raybestos and dismiss the complaint for lack of subject matter jurisdiction.

SHEPARD, C.J., and DICKSON, SULLIVAN, and RUCKER, JJ., concur.

STATE OF INDIANA) COUNTY OF MARION)	SS:	IN THE MARION COUNTY SUPERIOR COURT CAUSE NO. 49D12-0209-PL-001553

RAYBESTOS PRODUCTS COMPANY,

Plaintiff,

v.

THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Defendant.

ORDER GRANTING, IN PART, AND DENYING, IN PART, THE CROSS MOTIONS FOR SUMMARY JUDGMENT

(Filed Jul. 6, 2004)

On December 15 and 18, 2003 defendant Indiana Department of Environmental Management ("IDEM") and plaintiff Raybestos Products Company ("Raybestos") filed cross motions for summary judgment. The Court heard oral argument on the cross motions on June 10, 2004. For the reasons set forth below, Raybestos' and IDEM's *Motions* are GRANTED, in part and DENIED in part.

The essential facts are not disputed and are well summarized in Judge Keele's *Order on Petition For Review* dated June 1, 2001 as follows. In 1996, IDEM

alleged that Raybestos Products Company was responsible for the presence of PCBs in Shelly Ditch near Raybestos' Crawfordsville plant. The parties entered into an Agreed Order that required Raybestos to complete certain sequential steps, obtaining approval from IDEM for each step. Raybestos was required to evaluate the extent of the damage, prepare a Risk Assessment to evaluate the risk posed by the PCB's, prepare a Technical Memorandum defining cleanup goals on the conclusions of the Risk Assessment and complete the cleanup. Raybestos prepared and submitted its Baseline Risk Assessment and IDEM ultimately approved it. Raybestos then submitted its Technical Memorandum to which IDEM made comment. Raybestos addressed each of the stated concerns and the parties ultimately reached an agreement to clean all "hot spots" to no more than 238 ppm.

The IDEM commissioner who signed the Agreed Order was replaced with a new commissioner, John Hamilton. A new assistant commissioner, Mary Beth Tuohy, was brought in from outside the agency. Responsibility for Shelly Ditch, originally in the Project Management Section, was transferred to Harold Atkinson, an employee in the Site Investigations Section having virtually no experience with risk assessments. The new assistant commissioner decided that Raybestos' proposed cleanup level of 238 ppm based on the site specific Risk Assessment would not be approved. She believed it would set a bad precedent. She then instructed her new project manager

to disapprove Raybestos' Technical Memorandum and, because it was based on the already approved Risk Assessment, approval of that document had to be "withdrawn". The parties engaged in extensive administrative litigation, which culminated in judicial review of IDEM's actions. Judge Keele ordered IDEM to reinstate the Risk Assessment and to approve the Technical Memorandum. After protracted litigation, Judge Keele ordered IDEM to comply with his ruling requiring it to approve the Risk Assessment, which IDEM ultimately did.

IDEM and Raybestos agree that IDEM repeatedly asked the United States Environmental Protection Agency ("EPA") to step in and do what IDEM could not do under the Agreed Order: force Raybestos to perform a cleanup different than the cleanup required by IDEM's Agreed Order. On December 6, 2000, EPA complied with IDEM's requests and issued a Unilateral Administrative Order ("UAO") directing Raybestos to conduct a cleanup. Mr. Muno, the Superfund Director, testified that he could not recall any other instance where EPA intervened and began its own enforcement proceedings where an Agreed Order already was in place. However, the levels of PCB proposed by the Risk Assessment were high enough to be qualified as a high priority under the EPA's Superfund Hazard Ranking System. Raybestos has incurred substantial costs to comply with the EPA's requirements, which are in excess of what it would have cost Raybestos to do a cleanup based on the approved Risk Assessment.

Raybestos seeks damages and a declaratory judgment against IDEM for soliciting and obtaining the Unilateral Administrative Order, which Raybestos characterizes as a breach of the Agreed Order. The Agreed Order is a settlement agreement, a contract. The essential elements of a breach of contract action are: 1) the existence of a contract, 2) the defendant's breach thereof, and 3) damages. *Fowler v. Campbell*, 612 N.E.2d 596, 600 (Ind.Ct.App.1993). The plaintiff in such an action has the burden of demonstrating that the defendant's breach was a substantial factor contributing to the damages. *Holloway v. Bob Evans Farms, Inc.*, 695 N.E.2d 991, 995 (Ind.Ct.App.1998). The test for measuring damages in a breach of contract action is the foreseeability of such damages at the time of entering into the contract rather than the facts existing and known to the parties at the time of the breach. Raybestos agreed to perform a risk-based clean up and IDEM accepted. Through the parties' contract, IDEM received the benefit of forcing a risk-based clean-up without litigation, and Raybestos gave up its right to challenge IDEM's right to require it to do any cleanup. If the actions of the EPA in issuing the UAO were the result of the efforts on the part of IDEM to force a clean up different than that to which it had committed itself in the Agreed Order, then Raybestos will have proven a breach of the contract.

While the evidence is not in conflict as to whether IDEM tried to get the EPA to step in and change the standards of the clean up, it is in conflict as to whether the EPA would have done so absent the

solicitation of IDEM. In 1986, the EPA had issued a UAO to the owners of another site in the Sugar Creek Watershed, PR Mallory, to compel the cleanup of excessive levels of PCBs. PR Mallory was forced to clean up the PCB's to a level of 10 ppm or lower. The allowable levels of PCBs under the Risk Assessment prepared by Raybestos were considerably higher than levels permitted by the EPA. Further, the EPA has the right to over-file if the state action is ineffective. Therefore, it can't be said as a matter of law that the actions of the EPA were the direct consequence of the efforts by IDEM. This is Raybestos' burden to prove at trial.

IDEM contends it can't be bound to the terms the Agreed Order because it has the ability to ask for the intervention of the EPA by substituting the EPA as the lead agency in any enforcement action at any time. Further IDEM contends that the Agreed Order did not limit its ability to solicit the assistance of the EPA, and that over-filing is always a risk a polluter takes when it deals with IDEM. While the National Contingency Plan directs agencies with overlapping jurisdiction on environmental matters to communicate with one another, there is designated evidence that IDEM did not communicate with the EPA just to coordinate efforts. Designated evidence indicates that IDEM actively solicited the EPA to take a lead role when IDEM's leadership changed and it wished to avoid the terms of the Agreed Order. Paragraph 6 of the Agreed Order specifically states that IDEM shall be bound by the terms of the Agreed Order. The

Agreed Order provides an alternative dispute resolution process, but IDEM did not avail itself of this process when it determined that it wanted to avoid the Order all together. If IDEM is not bound to accept, in action and deed, the terms of the Agreed Order, then why would any citizen enter into such an agreement? The finality of the remedy was addressed in the Agreed Order as follows: "The objective of the RA [Removal Action] will be to address human health, environmental concerns and bring the site to closure such that no further actions are required."

Therefore, the Court grants partial summary judgment to the Plaintiff on the issue of breach of the contract. The facts are not in dispute: IDEM actively sought the UAO from the EPA to avoid the terms of the Agreed Order, which were binding upon it. The Court specifically finds that IDEM's statutory ability, and obligation at times, to seek the intervention of the EPA was not a justification for its breach of the Agreed Order. IDEM could have chosen to seek any level of clean up it deemed appropriate or could have sought the advice or intervention of EPA up until the time it entered into the Agreed Order. At that point in time it had the legal duty to abide by its agreement and to take no actions contrary thereto. However, the Court can not say, as a matter of law, that the actions of the EPA in issuing the UAO were the direct consequence of the solicitation by IDEM. Therefore, the issue of whether Raybestos suffered any damages directly flowing from the breach of contract remains in dispute. In addition, the Plaintiff has failed to

state a reason why the American Rule as to attorney fees does not apply, thus precluding this element of damages. Therefore, the Court grants partial summary judgment for the Defendant and orders that attorney fees are not recoverable by the Plaintiff, in the event the Plaintiff prevails on the underlying claim.

Dated: July 6, 2004 /s/ Robyn L. Moberly
Honorable Robyn Moberly, Judge
Marion County Superior Court, Civil Division

Copies to:

George M. Plews
(Atty. No. 6274-49)
Brett E. Nelson
(Atty. No. 22096-53
PLEWS SHADLEY RACHER & BRAUN
1346 North Delaware Street
Indianapolis, IN 46202-2415
Telephone: (317) 637-0700
Fax: (317) 637-0710

Timothy J. Junk
Office of the Attorney General
Indiana Government Center South
Fifth Floor
402 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6247

876 N.E.2d 759

Indiana Dept. of Environmental Management v. Raybestos Products Co.
Ind.App.,2007.

Court of Appeals of Indiana.
The INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Appellant-Defendant,
v.
RAYBESTOS PRODUCTS COMPANY,
Appellee-Plaintiff.
No. 49A02-0609-CV-782.

Nov. 15, 2007.

Steve Carter, Attorney General of Indiana, David L. Steiner, Frances Barrow, Timothy J. Junk, Deputy Attorneys General, Indianapolis, IN, Attorneys for Appellant.

George M. Plews, Brett E. Nelson, Plews Shadley Racher & Braun LLP, Indianapolis, IN, Attorneys for Appellees.

OPINION

MATHIAS, Judge.

The Indiana Department of Environmental Management ("IDEM") appeals the judgment of the Marion Superior Court in favor of Raybestos Products Company ("Raybestos") in Raybestos's breach of contract claim. IDEM raises three issues upon appeal, one of which we find dispositive: whether the trial court erred in granting partial summary judgment on

the issue of whether IDEM breached an agreed order entered into by the parties thus giving rise to a breach of contract claim.

We reverse.

Facts and Procedural History

Raybestos operates a plant in Crawfordsville, Indiana which manufactures automobile brakes and clutches. The plant is located next to Shelly Ditch, which is an open earthen drain bordered by seventeen homes, a school, a fairground, and a swimming pool. Surface water from the Raybestos plant flows through a culvert into Shelly Ditch, which empties into Sugar Creek approximately one mile from the Raybestos plant. Testing performed in 1995 by IDEM revealed that polychlorinated biphenyls, commonly known as "PCBs," were found in Shelly Ditch downstream from the Raybestos plant, but not upstream.

Eventually, IDEM sent Raybestos a notice of potential liability. IDEM also sent a memorandum to the federal Environmental Protection Agency ("EPA") recommending that Shelly Ditch be listed as a high priority in the Superfund Hazard Ranking. Instead, the EPA listed the Raybestos site as a low priority because IDEM was negotiating a cleanup order. On February 28, 1997, IDEM and Raybestos entered into an "Agreed Order" pursuant to Indiana Code section 13-25-4-23 (1998), in which Raybestos agreed to prepare a risk assessment subject to the approval of

IDEM. Then, based upon the risk assessment, Raybestos was to propose a removal plan, again subject to IDEM approval.

Raybestos prepared and submitted a risk assessment, which was ultimately approved by IDEM. Based upon the risk assessment, Raybestos then submitted its "technical memorandum" describing its planned cleanup. The proposed cleanup allowed certain "hot spots" to contain PCB levels of no more than 238 parts per million ("ppm"). Following personnel changes, IDEM determined that Raybestos' proposed cleanup would not be approved because it would set a bad precedent. IDEM then disapproved the cleanup proposal and, because the cleanup proposal was based upon the already-approved risk assessment, withdrew its approval of the risk assessment.

Displeased with this turn of events, Raybestos sought administrative review of IDEM's actions. At a dispute resolution meeting, IDEM informed Raybestos that no PCBs could be present at the cleanup site at levels higher than 10 ppm. After a hearing before an Administrative Law Judge ("ALJ"), the ALJ determined that Raybestos had waived its right to seek review of IDEM's actions based upon the terms of the Agreed Order. Raybestos sought judicial review of the ALJ's determination in the Marion Circuit Court. On June 1, 2001, Judge Michael D. Keele issued findings of fact and conclusions of law, determining therein that Raybestos had not waived its right to seek review of IDEM's actions and that

IDEM had no authority to withdraw its earlier approval of the risk assessment. Judge Keele ordered IDEM to re-approve the risk assessment and ordered it to approve of the cleanup proposed in Raybestos' technical memorandum. IDEM did not appeal this order. Instead, IDEM had been contacting the EPA and, after considerable prodding, convinced the EPA to become involved in the cleanup of the Raybestos site. On December 6, 2000, the EPA issued a Unilateral Administrative Order requiring Raybestos to clean up the PCBs to a level of no greater than 10 ppm. The cleanup required by the EPA was substantially more costly than the one which was approved by IDEM per court order.

On July 26, 2003, Raybestos filed in the Marion Superior Court a complaint for breach of contract against IDEM, alleging that IDEM had breached the Agreed Order and seeking as damages the substantially higher costs of the EPA-imposed cleanup. On December 17, 2003, IDEM filed a motion for summary judgment, which Raybestos responded to by filing a cross-motion for summary judgment. On June 10, 2004, the trial court held a summary judgment hearing. On July 6, 2004, the trial court granted partial summary judgment in favor of Raybestos on the issue of breach, but determined that there were genuine issues of material fact as to whether the EPA's involvement was a direct consequence of IDEM's solicitations.

On August 3, 2005, the parties filed stipulations regarding damages, and on August 8, 2005, a bench

trial began. On June 12, 2006, the trial court entered judgment in favor of Raybestos in the amount of $11,645,321.58. On October 30, 2006, the trial court entered judgment regarding additional damages and attorney fees in the amount of $4,716,691.33. IDEM now appeals.

Standard of Review

In this case, IDEM challenges several of the trial court's orders. However, as we find the summary judgment issue dispositive, we address only the trial court's grant of summary judgment in favor of Raybestos on the issue of whether IDEM's actions constituted a breach of the Agreed Order.

Summary judgment is a procedural means to halt litigation when there are no factual disputes and to allow the case to be determined as a matter of law. *Garneau v. Bush,* 838 N.E.2d 1134, 1140 (Ind.Ct.App.2005), *trans. denied.* Under Indiana Trial Rule 56, the moving party bears the burden of showing that there are no genuine issues of material fact; if the moving party meets its burden, then the burden shifts to the nonmoving party to set forth facts showing the existence of a genuine issue for trial. Id. Summary judgment is appropriate only where the designated evidence reveals no genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. *Id.* Summary judgment is inappropriate if any material facts are in dispute or even if undisputed facts can lead to conflicting material inferences. *Id.*

Discussion and Decision

In its order granting partial summary judgment to Raybestos, the trial court concluded that the Agreed Order was a valid contract and that IDEM breached the Agreed Order. However, the trial court concluded that genuine issues of material fact precluded summary judgment on the issue of resulting damages. IDEM claims that the Agreed Order is not a valid contract, but that even if it were to be considered a valid contract, its actions did not constitute a breach. Thus, if we assume without deciding that the Agreed Order was a binding contract, the dispositive issue becomes whether IDEM breached the Agreed Order.

Raybestos argues that IDEM's actions breached the Agreed Order. Although the parties present many arguments, we find one to be dispositive: whether the cleanup IDEM originally agreed to complied with applicable federal regulations. The cleanup proposed by Raybestos, which was based upon the Risk Assessment which IDEM had already approved, called for a cleanup level of 238 ppm. IDEM claims that the applicable federal regulations require PCB spills to be cleaned up to a level of no more than 10 ppm. In support of this claim, IDEM cites 40 C.F.R. section 761.125(c)(4)(v) (2007), which states in relevant part: Soil contaminated by the spill will be decontaminated to 10 ppm PCBs by weight provided that soil is excavated to a minimum depth of 10 inches. The excavated soil will be replaced with clean soil, i.e.,

containing less than 1 ppm PCBs, and the spill site will be restored (e.g., replacement of turf).

Raybestos does not directly deny the applicability of this federal regulation in its appellee's brief. Raybestos does refer to 40 C.F.R. section 761.120(c) (2007), which gives the EPA the "flexibility to allow less stringent or alternative decontamination measures based upon site-specific considerations." Raybestos does not explain, however, how this section allows IDEM the same flexibility.[1] More importantly, the Agreed Order upon which Raybestos bases its breach of contract claim specifically states that the most stringent standard will apply. *See* Appellant's App. p. 3730.

Thus, the 238 ppm cleanup proposed by Raybestos and based on the IDEM approved risk assessment did not meet the applicable federal standards. We fail to see how IDEM had any authority to approve a cleanup which did not comply with these standards. Again, such compliance was contemplated in the Agreed Order itself, which provided that, in the case of a conflict in the applicable laws, rules, or ordinances, that the most stringent standard would apply. *See* Appellant's App. p. 3730.

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[1] It is apparent that the EPA did not order a less stringent cleanup at the Raybestos site.

Based upon public policy grounds, we will not enforce agreements that contravene statute, that clearly tend to injure the public in some way, or that are otherwise contrary to the declared public policy of Indiana. *Ahuja v. Lynco Ltd. Med. Research,* 675 N.E.2d 704, 707 (Ind.Ct.App.1996), *trans. denied.* Clearly, an agreement which would permit cleanup levels over twenty times that of the applicable federal regulations would be contrary to public policy, and Raybestos may not rely upon such an agreement or recover for any breach thereof by IDEM. We therefore reverse the judgment of the trial court.

Reversed.

BAKER, C.J., and KIRSCH, J., concur.

STATE OF INDIANA)		IN THE MARION COUNTY SUPERIOR COURT
COUNTY OF MARION)	SS:	CAUSE NO. 49D12-0209-PL-001553

RAYBESTOS PRODUCTS COMPANY,

Plaintiff,

v.

THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Defendant.

JUDGMENT ENTRY REGARDING ADDITIONAL DAMAGES AND ATTORNEY FEES

(Filed Oct. 30, 2006)

This Court's June 12, 2006 Judgment Entry ("June 12 Judgment") set a hearing on the issue of the amount of attorney fees incurred and recoverable by Plaintiff Raybestos Products Company ("Raybestos") as a result of the breach of a February 29, 1997 Agreed Order by the Indiana Department of Environmental Management ("IDEM"). Prior to the six-day bench trial in this matter, Raybestos and IDEM stipulated that the parties would initially try this case as to IDEM's liability for Raybestos' alleged damages through September 20, 2003 and address post-September 20, 2003 damages after the Court entered judgment on Raybestos' initial claim. Following

the June 12 Judgment, Raybestos moved to join the issue of post-September 20, 2003 damages with the attorney fee hearing. The Court granted that motion and evidence was presented on both issues on September 8, 2006.

The parties stipulated additional evidence into the record, including invoices for the costs Raybestos claims as additional damages and a chart itemizing and classifying Raybestos' claimed attorney fees. Raybestos presented three witnesses and additional documents. IDEM called one witness.

The Court enters the following findings of fact and conclusions of law:

1. Raybestos' environmental contractor for the Shelly Ditch cleanup is Exponent. Since September 20, 2003, Exponent billed $398,465.22 in performing EPA-mandated environmental work at Raybestos' Crawfordsville facility and Shelly Ditch. Of this figure, $209,903.83 relate exclusively to the Shelly Ditch cleanup and should be recovered by Plaintiff in this action.

2. In addition, during the period from October 14, 2003 through August 14, 2004, Raybestos incurred $11,634.94 in remediating PCB contamination at Shelly Ditch in response to the demands of the United States Environmental Protection Agency ("EPA"), which do not include costs invoiced by Exponent and the Wildman Harrold law firm.

3. The cleanup of Shelly Ditch has not yet been completed.

4. Additional cleanup is being required by EPA in two parts of Shelly Ditch: "Reach 4" (downstream from Reaches 1-3 and closer to Sugar Creek) and the Railroad and Culvert Area ("RR & CA") (immediately downstream of Raybestos' outfall at the beginning of Reach 1).

5. Mr. Brugger is a Senior Environmental Engineer at Exponent with a long history of conducting environmental cleanups and is an expert in estimating the costs of performing environmental remediation.

6. EPA's Superfund Section is requiring additional cleanup of PCBs and lead in Reach 4.

7. Mr. Brugger currently estimates that Raybestos will incur $1,774,711 in future costs for cleanup of Reach 4. These costs include $1,443,711 in remedial costs, $88,000 in pre-remedial costs (including report preparation, design and coordination with EPA) and $243,000 in EPA oversight costs.

8. Cleanup of Reach 4 should be completed by December 2007.

9. Based on all of this evidence, the Court finds that the future costs of EPA-mandated cleanup in Reach 4 of Shelly Ditch will be at least $1,774,711. These costs, like the other costs imposed by EPA for the cleanup of Shelly Ditch, are a result of IDEM's

repeated solicitations for EPA involvement in breach of the Agreed Order.

10. EPA also is requiring additional cleanup of PCBs and lead at the RR & CA.

11. Enforcement efforts by EPA at the RR & CA include EPA's Superfund Section.

12. The RR & CA includes an active railroad spur that is used to service a number of businesses in Crawfordsville. This area was previously addressed as part of Reach 1 of Shelly Ditch under EPA's December 6, 2000 Unilateral Administrative Order ("UAO"). However, some PCBs were left in the ground in the RR & CA and the area was covered with a concrete cap.

13. In Order to remediate the remaining PCBs at the RR & CA, Exponent will need to excavate the area including the concrete cap and drive sheet metal vertically into the ground to stabilize the banks of Shelly Ditch and the perimeter of the excavation. This process will make the existing railroad spur potentially unstable and require that it not be used during the period of the excavation.

14. Based on discussions with EPA, Mr. Brugger testified that he expects the cleanup goal for the RR & CA to be 10ppm for PCBs, as it has been along the rest of Shelly Ditch. The actual levels of PCBs that are allowed to remain in this area will depend on the specifics of where the PCBs are located and how

difficult it is to remove them without destroying the existing railroad spur.

15. The court finds that the cost of future work at the RR & CA area will be $2,287,999.00 which includes $257,000 for EPA oversight costs.

16. Cleanup of the RR & CA should be completed by April 2008.

17. The Court finds that the future costs of EPA-mandated cleanup in the RR & CA of Shelly Ditch will be at least $2,287,999.00. These costs, like the other costs imposed by EPA for the cleanup of Shelly Ditch, arise from IDEM's repeated solicitations for EPA to force a more expensive cleanup in Shelly Ditch, in breach of the Agreed Order.

18. The Court finds that Raybestos has incurred an additional $304,584.45 in attorney fees through the Indianapolis law firm of Plews Shadley Racher and Braun ("PSRB") during the relevant period of time in an effort to defend against enforcement action by the EPA under CERCLA program resulting from IDEM's breach of the parties' settlement and the Agreed Order. Raybestos has argued that an additional $56,782.20 in attorney fees that were incurred to resist enforcement efforts brought under EPA program areas other than the Superfund Section should also be recoverable. The Court finds that the Plaintiff has failed to carry its burden of proof on this point, despite the lack of evidence presented by IDEM on this issue.

19. Raybestos also seeks $23,519.61 in PSRB attorney fees and expenses that the parties categorized as "bankruptcy" related. The Court finds that these fees were not reasonably related nor necessary to resolution of this underlying breach of contract and resulting environmental clean up matter and, therefore, the Court finds these fees are not recoverable.

20. The sole entry in the "other" column of Stip. Exh. 253 is a $7,319.55 entry on PSRB invoice No. 16756. Raybestos introduced backup documentation for this entry in the form of an invoice from the environmental contractor, Exponent. This expense related to an ecological risk assessment performed in anticipation of a claim for Natural Resources Damages ("NRD") under CERCLA. Again, the Court finds that the Plaintiff failed to carry its burden of proof that this expense was incurred in defending against the EPA actions that resulted from IDEM's breach of the Agreed Order.

21. The Chicago law firm of Wildman, Harrold, Allen & Dixon, LLP ("Wildman Harrold") invoiced Raybestos $78,693.83 for attorney fees and expenses that the Court finds are reasonable and relate to the EPA's Shelly Ditch enforcement actions that resulted from IDEM's breach of the Agreed Order.

22. Mr. Madonia estimated that his firm's billings through April 2008 would total $49,164.28. The Court finds that it is more likely than not that Raybestos' future legal costs relating to the EPA's Shelly Ditch enforcement action, which the Court has

previously found was caused by the breach of the Agreed order, will total at least $49,164.28.

Judgment

The Court, having heard and considered the evidence and facts described above, now concludes as follows:

A. Additional damages resulting from IDEM's breach.

1. The Court incorporates all of its Findings of Fact and Conclusions of Law contained in the June 12, 2006 Judgment as though specifically set forth herein.

2. The Court finds that Raybestos has incurred additional costs, since September 20, 2003, in performing the EPA-mandated cleanup of Shelly Ditch in the amount of $221,538.77. IDEM's breach of the Agreed Order was, at least, a substantial factor in causing these damages.

3. The EPA-mandated cleanup of Shelly Ditch is not yet completed. The Court finds that the future cost to Raybestos of EPA-mandated cleanup of Shelly Ditch will be at least $4,062,710. This figure includes $1,774,711 for the cleanup of Reach 4 plus $2,287,999.00 for the cleanup of the RR & CA. IDEM's breach of the Agreed Order was, at least, a substantial factor in causing these damages. Cleanup

of the Ditch will not be completed until at least April 2008.

B. Attorney Fees.

4. As discussed in the June 12, 2006 judgment, the Court is mindful of the holding in *Masonic Temple Association of Crawfordsville v. Indiana Farmers Mut. Ins.* Raybestos incurred $304,584.45 in attorney fees through PSRB and $78,693.83 through the Wildman Harrold firm in defending against the EPA actions and overseeing EPA-mandated cleanup directly related to the breach of the Agreed Order.

5. Raybestos will continue to incur attorney fees in defending against the EPA actions, and overseeing EPA-mandated cleanup, at Shelly Ditch through April 2008. Raybestos' future legal costs relating to the EPA's Shelly Ditch enforcement action will total at least $49,164.28.

WHEREFORE, the Court finds that Raybestos has proven additional damages, since September 20, 2003, in the amount of $4,716,691.33. The Court enters judgment in Raybestos' favor in the total amount of $4,716,691.33. This judgment is in addition to the $11,645,321.58 awarded in the Court's June 12 Judgment.

Dated: 10/30/06

/s/ Robyn L. Moberly
Honorable Robyn Moberly,
Judge
Marion County Superior
Court, Civil Division 12

Copies to:

George M. Plews (Atty. No. 6274-49)
Brett E. Nelson (Atty. No. 22096-53)
PLEWS SHADLEY RACHER & BRAUN
1346 North Delaware Street
Indianapolis, IN 46202-2415
Telephone: (317) 637-0700
Fax: (317) 637-0710

Timothy J. Junk
Deputy Attorney General
Indiana Department of Environmental Management
100 N. Senate Ave., MC 60-1
Ind. Gov. Cent. North, 1307
Indianapolis, IN 46204
Telephone: (317) 232-6247

STATE OF INDIANA	)	**IN THE MARION COUNTY SUPERIOR COURT**
	)**SS:**	
COUNTY OF MARION	)	**CAUSE NO. 49D12-0209-PL-001553**

RAYBESTOS PRODUCTS COMPANY,

Plaintiff,

v.

THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Defendant.

JUDGMENT ENTRY

(Filed Jun. 12, 2006)

On July 26, 2002 Plaintiff, Raybestos Products Company, ("Raybestos") filed this suit against the Indiana Department of Environmental Management ("IDEM") alleging breach of contract and seeking declaratory relief. The case arises out of an alleged breach of an Agreed Order dated February 28, 1997 between Raybestos and IDEM concerning investigation and cleanup of polychlorinated biphenyls ("PCBs") and lead in an area known as Shelly Ditch in Crawfordsville Indiana. Raybestos alleges that IDEM repeatedly asked the United States Environmental Protection Agency ("EPA") to step in and do what IDEM could not do under the Agreed Order:

force Raybestos to perform a cleanup different than the cleanup required by IDEM's Agreed Order. EPA eventually did so. The cost of the cleanup was substantially higher than the cost of the cleanup Raybestos expected to perform under the Agreed Order. Raybestos seeks these increased costs as damages in this action.

The IDEM alleges that the Raybestos site contained high levels of PCB's as would adversely affect human health or the environment from pollution or contamination. IDEM further alleges that the Agreed Order between IDEM and Raybestos contemplated the adoption of a Baseline Risk Assessment. The Risk Assessment entered into between the parties was an error on the part of IDEM and did not adequately protect human health and the environment. Therefore, IDEM sought the intervention of the EPA to exercise jurisdiction and force a different clean up. IDEM contends that it had the right to actively seek the intervention of the EPA and that eventually the EPA would have forced a clean up higher than the Risk Assessment indicated was necessary and, therefore, there were no damages suffered by Raybestos. On July 6, 2004, the Court granted in part and denied in part the parties' cross motions for summary judgment ("July 6 Order"). In its July 6 Order, this Court found that the "Agreed Order is a settlement agreement, a contract"; IDEM's requests for EPA intervention were a breach of contract as a matter of law; IDEM had a legal duty to abide by its agreement with Raybestos and to take no actions

contrary thereto, and "IDEM's statutory ability . . . to seek the intervention of the EPA was not a justification for its breach of the Agreed Order". The Court reserved for trial the question of whether IDEM's requests to EPA were a substantial factor in bringing about EPA's involvement in the Shelly Ditch cleanup and, ultimately, its issuance of a Unilateral Administrative Order ("UAO") to Raybestos requiring a much more expensive cleanup.

A six-day bench trial was held on August 2-3, November 14-15 and December 28, 2005 and January 19, 2006. The parties stipulated substantial evidence into the record, including deposition testimony, invoices for the costs Raybestos claims as damages, various written communications within and between EPA and IDEM and numerous other documents. In addition, the parties stipulated that the issue of damages at trial would be confined to IDEM's liability for Raybestos' damages through September 20, 2003 and that the issue of damages accruing after September 20, 2003, if any, will be reserved for resolution at a later date.

Having heard witnesses and received evidence, the Court enters the following findings of fact and conclusions of law:

I. Findings of Fact.

1. In 1951, Raybestos of Manhattan, Inc., began the manufacturing of friction products for the automotive industry, such as brakes and clutches, in

Crawfordsville, Indiana. From 1982 through 1987, the Crawfordsville facility was owned by Ray Mark Industries, and since 1987 it has been owned and operated by the Raybestos Products Company.

2. Raybestos' manufacturing plant is adjacent to Shelly Ditch. Surface water from the Raybestos manufacturing facility flows through an on-site culvert and into the adjacent Shelly Ditch. About a mile downstream, Shelly Ditch empties into the Sugar Creek. Shelly Ditch is approximately 5000 feet in length and begins by the east edge of the railroad tracks on the west side of the Raybestos manufacturing facility. Shelly Ditch is an open earthen drain bordered by the backyards of 17 homes, a school, a fairgrounds, and a swimming pool.

3. In 1995, PCB's were found in Shelley Ditch. IDEM contacted Raybestos about the PCBs discovered in Shelly Ditch, and, in 1996 Raybestos began an investigation. Raybestos learned that in 1967 its corporate predecessor had purchased and used an hydraulic oil that contained a specific type of PCB known under the brand name "Pydraul F-9." Pydraul F-9 was heavier than water and contained one specific PCB Aroclor. Raybestos traced its PCBs from the oil spills on the floor of the tunnels under the furnace lines, to a sump which pumped to an 18-inch culvert, which then discharged into Shelly Ditch. Surface rainwater also flowed into the 18-inch culvert, and Raybestos believed that each rain event would wash residual PCBs into Shelly Ditch. In 1996, Raybestos also excavated the 18-inch culvert and replaced the

section of fitted drain tile closest to the discharge into Shelly Ditch.

4. On June 13, 1996, IDEM sent Raybestos a "Special Notice of Potential Liability" regarding Shelly Ditch. Mark Jaworski, IDEM's Project Manager in Site Investigations, prepared a Memorandum of Decision to the EPA recommending that Shelley Ditch receive a high priority on the Superfund Hazard Ranking system. On September 30, 1996, Jan Pels (Early Action Project Manager, Region V, EPA) made a "Remedial Site Assessment Decision" assigning Raybestos a "low priority" and noting that the "State is negotiating [an] order for cleanup."

5. The EPA Superfund Division generally defers to cleanup efforts by a state or another federal program, and will not take action on a site if the human health and environmental threats posed by that site are being addressed through enforcement efforts by a state (such as Indiana).

6. On February 28, 1997, IDEM and Raybestos entered an Agreed Order pursuant to Indiana Code §13-25-4-23. Among other things, the Order required Raybestos to remove and dispose of the PCB's and take any "actions necessary to monitor, assess and evaluate the continuing effectiveness" of the removal of the PCB's from Shelly Ditch.

7. Attached to the Agreed Order for Removal is a Statement of Work which describes the purpose of the removal action as follows:

I. PURPOSE

The purpose of this Removal Action (RA) is to investigate the nature and extent of impacts at the Shelly Ditch site and to develop, evaluate, and implement alternatives, as appropriate. The objective of the RA will be to address human health and environmental concerns and bring the site to closure such that no further actions are required.

8. The parties also agreed that the Agreed Order for Removal would take precedence over any conflict that might arise with either the Statement of Work or the approved Removal Work Plan. In Paragraph 14 of the Agreed Order for Removal, Raybestos promised that "the activities conducted by the Respondent shall be consistent with the requirements of the National Oil and Hazardous Substance Pollution contingency Plan, U.S. EPA guidance documents, and all applicable laws."

9. The Agreed Order provided for alternative dispute resolution if a disagreement occurred between IDEM and Raybestos during the process of developing of plans, obtaining a risk assessment, engineering evaluations, technical memorandum, implementation and completion of the project.

10. A dispute did occur between IDEM and Raybestos when IDEM decided that the Risk Assessment it had previously approved was approved in error and, therefore, all subsequent actions taken, including the

written Agreed Order signed by the then-Commissioner of IDEM were repudiated by IDEM.

11. For reasons not explained through testimony, IDEM never sought resolution of its dispute under the process provided in the Agreed Order.

12. Whether the Baseline Risk Assessment, the Technical Memorandum, and Statement of the Work fully insured human health and the environment is not known by this court and is not an issue in the present case.

13. On March 16, 1998, after 15 months of review both by its staff and an outside risk assessment contractor, IDEM did approve Raybestos' Risk Assessment.

14. Raybestos paid for the preparation and submission of a Technical Memorandum. IDEM's staff suggested a "hot spot" cleanup to remove all PCB's to a maximum remaining concentration of 238 ppm in the worst areas. Ultimately, on November 30, 1998, IDEM "withdrew" its approval of the Risk Assessment.

15. In response to IDEM's withdrawal of approval, Raybestos went through the administrative appeal process. Ultimately Raybestos obtained a judgment from a Marion Superior Court finding that IDEM "arbitrarily withdrew approval of the Risk Assessment, although there was nothing wrong with the report. The agency then used the withdrawal of approval as the basis for disapproving the Technical

Memorandum . . . IDEM did not rely on any site-specific evidence about the Shelly Ditch . . . IDEM acted arbitrarily."

16. On June 1, 2002, the court ordered IDEM to reinstate the approval of the Risk Assessment and the approval of the Technical Memorandum. IDEM never appealed the decision of the Marion Superior court and by letter dated September 14, 2001; IDEM eventually approved and reinstated the Baseline risk Assessment for Shelly Ditch and the Technical Memorandum.

17. On July 14, 1998, two months after the submission of the Technical Memorandum, Raybestos' contractor asked the US Fish & Wildlife Service for a critical habitat review in the vicinity of Shelly Ditch. The letter acknowledges that this review was requested as part of an ecological screening assessment required by an Agreed Order between Raybestos and the Department.

18. The US Fish & Wildlife Service responded by letter dated August 25, 1998, and identified Shelly Ditch as within the range of the Federally endangered Indiana bat, and the Federally threatened bald eagle. A portion of Sugar Creek in Montgomery County is considered a primary wintering area for eagles in Indiana.

19. Raybestos responded to the issues present by the US fish & Wildlife Service by stating that the issues pertaining to the Ecological Screening Assessment Report were being addressed in a separate

document, and that subsequent revisions to the Technical Memorandum should be deferred until the comments on the Ecological Screening Assessment Report were fully addressed.

20. In 1998, IDEM experienced a change in top administration and John Hamilton became the new commissioner. Mr. Hamilton visited Crawfordsville in late August 1998 and very publicly promised residents that Shelly Ditch would be cleaned up promptly.

21. On September 22, 1998 an internal IDEM memorandum was prepared and circulated among the top administrators at IDEM. The memorandum discusses the "impasse" perceived by IDEM and lays out options for IDEM to pursue to force Raybestos to adopt a different cleanup level. These options included: resolution through the Agreed Order's dispute resolution provisions; "[e]ncourag[ing] EPA to pursue cleanup and enforcement through TSCA/RCRA."; and "[p]ursu[ing] National Priority Listing by scoring both the Sugar Creek and Shelly Ditch." According to that memorandum, placement of Sugar Creek on the NPL (National Priority List) "would allow IDEM to pursue the PCB contamination in both Shelly Ditch and Sugar Creek." The memorandum outlines with considerable precision the steps IDEM subsequently took to involve EPA.

22. Catherine Gibbs, the IDEM lawyer who negotiated the Agreed Order and IDEM employee Harry Atkinson asked a member of IDEM's RCRA group,

Don Stilz to assist in compelling Raybestos to conduct a cleanup different than the one IDEM and Raybestos had developed under the Agreed Order. Mr. Stilz made efforts to get the Raybestos site re-ranked under the National Corrective Action Prioritization System ("NCAPS"). He believed that re-ranking would allow IDEM to require a cleanup standard significantly lower than the 238 ppm standard already approved by IDEM.

23. In mid-October, 1998, IDEM's Mike Sickels, Don Stilz' supervisor, had a telephone conversation with EPA as to whether EPA would consider assigning a higher RCRA priority to Raybestos Products Company and discussed this information with Don Stilz.

24. By e-mail dated October 15, 1998, Mr. Stilz advised Catherine Gibbs that IDEM might be able to get Raybestos ranked as a "high" priority under RCRA.

25. On October 16, 1998, Mr. Stilz provided a draft memorandum to Harry Atkinson regarding how to get EPA to re-rank and Stilz' supervisor, Mike Sickels, sent an e-mail noting the difficulties in getting EPA to rescore a site as a high priority.

26. On October 29, 1998, Don Stilz circulated an Office Memorandum advising that EPA's RCRA section had ranked Raybestos as a "low priority" site and noting that IDEM's "problem" was how to get EPA to re-rank Raybestos. Mr. Stilz prepared this memorandum in response to the phone call that he received from Harry Atkinson and Catherine Gibbs

regarding the authority of IDEM's Corrective Action section to compel a cleanup different than the one agreed to pursuant to the Agreed Order.

27. The October 29 memorandum states that "EPA is very reluctant to "create" more high priorities for the Corrective Action program" and suggests that "the only chance we have to achieve the re-ranking we desire is to have [IDEM] Commissioner Hamilton personally request Director Robert Springer, Waste, Pesticides and Toxics Division, U.S. EPA, Region 5 to do so."

28. On November 4, 1998, IDEM sampled the outfall from Raybestos' plant into Shelly Ditch for the third time without the presence of Raybestos. PCBs were detected at 3.5, 2.5, .4 and .15 parts per billion detection limits in four of the seven samples it tested. The presence of the opposing party at a sampling was a contractual requirement of the Agreed Order. IDEM seems to argue that they now have information that Raybestos sampled its own soil without the presence of IDEM and, therefore, it excuses IDEM from complying with the contract requirement to offer the other party an opportunity to participate in sampling. Since IDEM used the test results of the sampling (outside the presence of Raybestos) as a reason to coerce or entice the EPA into "over filing" it is of far greater concern that this sampling was done "on the sly".

29. Mr. Stilz contacted EPA employee Kendal Moore on November 9, 1998 to advise EPA of the sampling

results from Raybestos' outfall and request that EPA conduct a TSCA facility inspection at Raybestos.

30. On November 10, 1998 IDEM issued a press release regarding Raybestos' alleged "illegal dumping" of PCBs into Shelly Ditch. At a public meeting that same day, IDEM announced to Crawfordsville residents that it intended to "withdraw" approval of Raybestos' Risk Assessment.

31. On November 16, 1998, Raybestos sent a notification of dispute to IDEM pursuant to the dispute resolution provisions of the Agreed Order.

32. On December 3, 1998, in response to a call from IDEM employee Don Stilz, EPA's TSCA section performed a TSCA inspection at Raybestos. According to the inspection report, four IDEM employees and two EPA employees were present at that inspection.

33. EPA's TSCA group did not have any interest in Raybestos prior to Stilz' November 1998 call.

34. On March 12, 1999, IDEM's Section Chief for Solid Waste Enforcement, Paul Higgenbotham, suggested that IDEM's Deputy Commissioner, Bruce Palin, and Assistant Commissioner, Mary Beth Tuohy "contact[ ] EPA Region 5 Senior Staff to help expedite EPA's decision making and coordination involving Raybestos." The "decision making" referenced in this memorandum refers to how EPA could use its authority to force Raybestos to clean up Shelly Ditch as requested by IDEM.

35. On March 22, 1999, in response to an internal IDEM inquiry about the remedy for the Raybestos site, IDEM's project manager sent an e-mail reporting that "[w]e are in the process of contacting EPA to find out if they will commit to some level of involvement – now and in the future."

36. At a March 1999 meeting, IDEM expressed to EPA its "desire to have EPA assume some "bad cop" role in their discussions with Raybestos thus pressuring them to some more final cleanup at least for Shelly Ditch . . . using the threat of NPL listing and or an imminent removal should Raybestos not be moved." EPA's e-mail notes that "[t]he Shelly Ditch problem has become a bit more high profile recently due to an IDEM commissioner visit last year that promised cleanup actions to begin this Spring." The EPA was aware of the recent sampling at the out fall which found measurable PCB's and that a RCRA corrective action order was in place for lead remediation on the facility. As of March 1999, the Shelly Ditch issue was clearly known by the EPA as the result of actions by IDEM.

37. Raybestos was aware that EPA had the right to over-file to compel a more stringent cleanup than that proposed by Raybestos. Raybestos accepted the "risk" that the EPA would over-file when it signed the Agreed Order with IDEM. However, Raybestos did not accept the "risk" that IDEM would instigate, encourage, facilitate and insist upon the EPA over-filing.

38. On April 1, 1999, the Department's Project Manger [sic] Angelo Dattilo met with Raybestos' environmental consultant, Michael Kasnick. Kasnick advised Dattilo that he was preparing a work plan for Shelly Ditch based upon a cleanup target of 238 ppm. Kasnick was aware that even if the Department approved the work plan, EPA could over-file and require any additional work necessary to meet EPA's regulatory standards.

39. IDEM was, in fact, using the threat of EPA involvement and NPL listing to encourage Raybestos to agree to a cleanup of Shelly Ditch different than the cleanup it agreed to pursuant to the Agreed Order. It is unknown why IDEM did not attempt Alternative Dispute Resolution under the Agreed Order.

40. Shelly Ditch first came to the attention of EPA's RCRA group in March of 1999 through a contact by Joe Duffiey of EPA Region V's Superfund section due to IDEM's requests.

41. EPA's RCRA group was not involved with Shelly Ditch prior to March of 1999, when it began developing a GPRA baseline for 2005.

42. Raybestos was not initially listed under GPRA but was included in the GPRA baseline because IDEM asked EPA to exercise its discretion to add the facility to the list.

43. An April 5, 1999 IDEM e-mail from its project manager notes that Raybestos was "forcing the issue

and making IDEM decide what is right for the IDEM society." The e-mail notes that if IDEM were to approve an amended work plan it expected to receive from Raybestos, Raybestos was "willing to allow EPA to overfile and deal with them for any future action – *which we know may not be likely.*"

44. Another IDEM e-mail, dated April 9, 1999, notes that EPA's RCRA Corrective Action Project Manager, Gerry Philips, indicated that "since this [Raybestos] site is a low priority, he [Philips] had no plans to address it at this time."

45. IDEM expected that the Sugar Creek Sediment Site was going to be listed on the NPL and that Shelly Ditch would then be addressed by EPA.

46. A May 11, 1999 internal EPA e-mail notes that the Raybestos site is "A low priority for CA [Corrective Action] under RCRA" but that IDEM's "superfund people want to refer cleanup of Shelly Ditch . . . and Sugar Creek to us for possible NPL listing." The e-mail notes that IDEM's Assistant Commissioner, Mary Beth Tuohy, was asking about EPA's potential involvement on a weekly basis.

47. EPA's Office of Regional Counsel assigned an attorney to the Shelly Ditch matter on September 8, 1999. The assignment form notes that "This was a state-led case. IDEM has asked for federal assistance with this recalcitrant facility." IDEM was actively soliciting, encouraging, and insisting upon EPA involvement in the clean up of the Raybestos/Shelly Ditch site. Although it is unknowable whether the

EPA would have ever involved itself in the Shelly Ditch clean up, the evidence is voluminous and overwhelming that the EPA would not have gotten involved in the clean up when it did or any time in the foreseeable future, but for the efforts of IDEM.

48. On October 29, 1999, EPA accepted IDEM's referral, confirmed that EPA's addition of Raybestos to the GPRA Corrective Action baseline "despite the low NCAPS ranking" was made possible "[b]ased on the updated information that [IDEM] provided" and agreed to "use all of its authorities to address this matter promptly."

49. The Sugar Creek Sediment Site would not have been slated for a site assessment team if IDEM had not proposed the site to EPA.

50. On December 15, 1999, EPA and IDEM held a public meeting for citizens of Crawfordsville. At this meeting, IDEM told the public that EPA was involved in Shelly Ditch because IDEM requested its assistance. EPA confirmed at the December 15, 1999 public meeting that it was involved in Shelly Ditch because IDEM requested its assistance.

51. On December 6, 2000, EPA issued a Unilateral Agreed Order ("UAO") requiring Raybestos to clean up Shelly Ditch.

52. EPA's Superfund Director William Muno testified that EPA thought that IDEM "had been unable to compel Raybestos to cleanup Shelly Ditch," and that IDEM "was giving up on its efforts" to cleanup Shelly

Ditch and, therefore, that "any further deferral to Indiana's ongoing enforcement efforts would not be warranted."

53. Mr. Muno was unaware of the Agreed Order.

54. Generally, if a state agency like IDEM is supervising a cleanup and they are the lead agency and the cleanup is proceeding, there isn't any reason why Superfund would get involved.

55. EPA would have been reluctant to get involved at a state-led sight [sic], particularly when it had not previously been involved.

56. EPA Region V's Superfund Director at the time, Mr. William Muno, was not aware of a single instance where EPA has interceded after the completion of cleanup according to an agreed order between the state and the respondent.

57. IDEM requested that EPA issue the UAO.

58. EPA's Superfund Director, Ric Karl, was unaware of any citizens group tracking the cleanups in Shelly Ditch or the Sugar Creek Sediment Site

59. As stated above, on June 1, 2001 Judge Keele issued his Final Order finding that IDEM's withdrawal of approval of Raybestos' Risk Assessment and disapproval of Raybestos' technical memorandum were "arbitrary and capricious and unsupported by substantial evidence." The Final Order found that IDEM had breached the Agreed Order, that Raybestos was prejudiced by IDEM's breach and that

approval of the Risk Assessment should be reinstated and the Technical Memorandum should be approved.

60. IDEM did not comply with the Final Order, and on September 10, 2001 Judge Keele entered an order compelling IDEM to reinstate approval of the Risk Assessment and approve the Technical Memorandum.

61. On September 10, 2001 IDEM sent a letter purporting to comply with Judge Keele's Final Order.

62. There were reasons that the EPA could have or might have eventually initiated enforcement actions against the Plaintiff, but the Court is unconvinced that there was any other factor in the EPA's involvement other than the persistent insistence of IDEM.

63. IDEM's communications to EPA regarding Shelly Ditch were not done in the ordinary course of business. IDEM mounted a planned, organized, persistent campaign to use EPA to force a different cleanup.

64. The EPA's enforcement action was not due to possible NPL listing of the Sugar Creek Sediment Site or any pre-breach communication by IDEM.

65. IDEM argued that its employee, Don Stilz, contacted EPA's TSCA group to report water samples and that this "legitimate" communication could have caused EPA enforcement under RCRA or TSCA. However, there is no evidence supporting this speculation. Further, Mr. Stilz's communication with TSCA was after IDEM had already made threats to try to involve the EPA's authority to force a clean up. EPA's

TSCA group did not have any interest in Raybestos prior to Stilz's call.

66. EPA's RCRA group was not involved with Shelly Ditch prior to March of 1999, when it began developing a GPRA baseline for 2005. Raybestos was not initially listed under GPRA but was included in the GPRA baseline because IDEM asked EPA to exercise its discretion to add the facility to the list. There is no evidence that the UAO resulted from any EPA TSCA or RCRA action.

67. Independent action by EPA – that is, action not related to IDEM's improper solicitations – under TSCA or RCRA was not a substantial factor in EPA's involvement in the Shelly Ditch cleanup.

68. The projected costs of Raybestos' cleanup of Shelly Ditch under the Agreed Order it entered with IDEM was $2,367,516.

69. The cost of the cleanup Raybestos was required to perform under the UAO was $14,012,837.58, excluding all attorney fees. $2,367,516.00 would have been incurred if IDEM had not breached the agreement between the parties, causing EPA to initiate federal enforcement action. The increased costs to Raybestos of cleaning up Shelly Ditch to the level required by the EPA was $11,645,321.58.

II. Conclusions of law.

The Court, having heard and considered the evidence and facts described above, now concludes as follows:

"The essential elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages." *Nieto v Kezy*, 846 N.E.2d 327 (Ind. Ct. App. 2006), *citing Rogier V American Testing and Engineering Corp.*, 734 NE2d 606 (Ind. Ct. App. 2000), reh'g denied, trans. denied.

To succeed on breach of contract claim, the plaintiff bears the burden of proving that defendant's breach of contract was a "substantial factor" contributing to plaintiff 's damages. *Holloway v. Bob Evans Farms, Inc.*, 695 N.E.2d 991 (Ind. Ct. App. 1998) and *Fowler v. Campbell*, 612 N.E.2d 596 (Ind. Ct. App. 1993).

"[T]he test of causation in common law contract actions is not whether the breach was the only cause, or whether other causes may have contributed, but whether the breach was a substantial factor in bringing about the harm." *Fowler. Supra*, at 602.

"Indiana does not recognize comparative causation." *Parke State Bank v. Akers*, 659 N.E.2d 1031. 1034-35 (Ind. 1995).

The Court finds that Raybestos met its burden of showing that IDEM's repeated requests to EPA to initiate an enforcement action were at least a substantial factor in EPA's involvement in the Shelly

Ditch site and issuance of the UAO. There is virtually no evidence that EPA became involved in the Shelly Ditch cleanup for any reason other than IDEM's persistent and repeated requests that EPA do so. As of the date of trial, the Sugar Creek Sediment Site still had not been listed as an NPL site, despite the efforts of IDEM.

As set forth above, Raybestos is seeking to recover the difference between the cost of the cleanup that would have resulted from the Agreed Order and the cost of the cleanup it ultimately performed under the UAO. The Court has carefully reviewed the invoices and IDEM's written objections to the invoices. The Court finds that the estimated cost of Raybestos' cleanup of Shelly Ditch under the Agreed Order it entered with IDEM was $2,367,516. The cost of the cleanup Raybestos was required to perform under the UAO was $14,012,837.58, excluding all attorney fees. The difference between these figures is $11,645,321.58.

The Court previously granted IDEM's motion for summary judgment on the issue of whether Raybestos could recover any portion of its attorney fees as damages in this action. Raybestos argued that attorney fees related to defending and responding to the EPA action brought about by IDEM's breach were consequential damages. However, the Court found that Raybestos had not shown any reason why the American Rule should not apply and held that Raybestos could not recover attorney fees in the event it prevailed.

Raybestos argues that *Masonic Temple Association of Crawfordsville v. Indiana Farmers Mut. Ins.*, 837 N.E.2d 1032 (Ind. Ct. App. 2005) (*re hearing denied* March 7, 2006) mandates that this court reconsider its partial summary judgment ruling that the American Rule for the recovery of attorney fees in litigation should apply in this case. The decision in *Masonic Temple* was published during the pendency of this case. In *Masonic Temple*, the Indiana Court of Appeals adopted the third-party litigation exception to the American Rule that attorney fees are not recoverable by a prevailing party. The elements necessary to apply this exception are: (1) the plaintiff became involved in a legal dispute because of the defendant's breach of contract or other wrongful act; (2) the litigation was with a third party and not the defendant; and (3) the fees were incurred in that third-party dispute. *Id.* The Court orders that attorney fees incurred in responding to the EPA action, only, are compensable as foreseeable consequential damages of the breach. Raybestos may not collect any of the attorney fees incurred in the first Marion Superior Court (environmental court) action before Judge Keele nor in the present action against IDEM.

Raybestos has been over-reaching in its request for fees in this action. Raybestos has not limited its request to attorney fees reasonably incurred in its legal representation of Raybestos in dealing with the third party, the EPA, and over-seeing compliance with the UAO. Therefore, this Court declines to accept the argument that *Masonic Temple* applies to all fees

requested by Raybestos. The Court has attempted to review the evidence as it was presented to this Court with regard to the attorney fees of Plews Shadley Racher and Braun. The invoices include many entries that are unclear as to which legal matter (versus IDEM or overseeing the EPA enforcement action) the fee is related. Therefore, this Court has no alternative but to set this matter for proceedings confined to the issue of allocation of attorney fees between these two matters.

Raybestos argues it is entitled to collect prejudgment interest on its damages for breach of contract against the state. However, unless a state has waived its sovereign immunity by expressly consenting to suit through a "clear declaration" of that consent, it is not subject to suit in its courts. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680, 119 S.Ct. 2219, 2228, 144 L.Ed.2d 605 (1999). Indiana has consented to suits against the State for breach of contract pursuant to Indiana Code § 34-13-1-1. There is no provision therein that provides for liability on the part of the State for prejudgment interest and, therefore, this Court finds that prejudgment interest is not recoverable against the State in a breach of contract action. However, the State has consented to *post* judgment interest under the provisions of Indiana Code § 34-13-1-6:

Judgments against state; interest rate; appropriation to pay judgment

Sec. 6. Whenever, by final decree or judgment, a sum of money is adjudged to be due any person from the state, an execution shall not issue but the judgment shall draw interest at an annual rate of six percent (6%) from the date of the adjournment of the next ensuing session of the general assembly until an appropriation is made by law for the payment and the judgment is paid.

Therefore, this Court finds and orders that Raybestos is entitled to post judgment interest at the rate of 6% per annum from the date of the adjournment of the next ensuring session of the general assembly until an appropriation is made by law for the payment and the judgment is paid.

Indiana citizens deserve to have government honor the agreements it enters with them. If IDEM is not required to abide by the agreements it enters, Indiana's citizens will have no incentive to enter such agreements and IDEM's ability to achieve cleanup of environmental problems will be substantially impaired.

Public policy considerations weigh in favor of encouraging voluntary cleanup of Indiana's environmental problems. Citizens like Raybestos should be encouraged to enter agreements with IDEM for appropriate cleanup rather than spending time and money litigating whether they are ultimately responsible. Where disagreements develop during the course

of cleanups IDEM can, and should, pursue dispute resolution through the provisions it includes in its agreements. While this judgment includes a substantial cost that ultimately is borne by our taxpayers, the damages involved are the consequence of IDEM's actions, and all our citizens have an interest in the government abiding by its promises. Hopefully such an award will prompt more careful, adherence to IDEM's obligations. Sometimes, substantial awards against public entities are necessary to effect careful attention to keeping promises; other courts have awarded such damages in similar cases. *E.g.*. *Entergy Arkansas, Inc. v. State of Nebraska*, 226 F. Supp. 2d 1047, 1161 (D. Neb. 2002) *Aff'd* 358 F.3d 528 (8th Cir. 2004); *reh'g and reh'g en banc denied* 366 F.3d 688 (8th Cir. 2004). Ultimately, Indiana's citizens will benefit from encouraging responsible action from its public agencies.

WHEREFORE, the Court finds that Raybestos has met its burden of proving that IDEM's breach of the Agreed Order was at least a substantial cause, and it is most likely true that it was the direct cause of EPA's involvement in the cleanup of Shelly Ditch and issuance of the Agreed Order. The Court further finds that Raybestos has proven damages in the amount of **$11,645,321.58, excluding attorney fees and the Court enters a partial judgment in this amount.** The court sets this matter for hearing on the issue of the amount of attorney fees incurred and recoverable by the Plaintiff in relating to the EPA in the federal enforcement action and over-seeing the

implementation and compliance with the Unilateral Administrative Order on **July 7, 2006 at 10:00 a.m.** Raybestos should be awarded post judgment interest on the judgment amount at the statutory rate of interest for breach of contract against the State of Indiana at the rate of 6% per annum from the date of the adjournment of the next ensuring session of the general assembly until an appropriation is made by law for the payment and the judgment is paid.

Dated: June 12, 2006

/s/ Robyn L. Moberly
Honorable Robyn Moberly,
Judge
Marion County Superior Court,
Civil Division 12

Copies to:

George M. Plews (Atty. No. 6274-49)
Brett E. Nelson (Atty. No. 22096-53)
PLEWS SHADLEY RACHER & BRAUN
1346 North Delaware Street
Indianapolis, IN 46202-2415
Telephone: (317) 637-0700
Fax: (317) 637-0710

Timothy J. Junk
Office of the Attorney General
Indiana Government Center South
Fifth Floor
402 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6247

Cindy Shively Klem, N1307
Indiana Department of Environmental Management
Indiana Government Center-North
100 N. Senate Avenue
Indianapolis, IN 46204

STATE OF INDIANA)		IN THE MARION SUPERIOR COURT
) SS:		
COUNTY OF MARION)		CAUSE NO. 49F12-0101-MI-00194

RAYBESTOS PRODUCTS COMPANY,

Petitioner,

v.

THE OFFICE OF ENVIRONMENTAL ADJUDICATION AND THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Respondents.

ORDER ON PETITION FOR REVIEW

(Filed Jun. 1, 2001)

Petitioner Raybestos Products Company ("Raybestos") seeks review of actions' taken by respondent the Indiana Department of Environmental Management ("IDEM"). Oral argument was held May 9, 2001. Having considered the timely submitted briefs and the arguments of the parties, the Court determines that Raybestos has been prejudiced by the actions of IDEM in the manner set forth in Ind. Code § 4-21.5-5-14(d). Accordingly, pursuant to Ind. Code § 4-21.5-15(1) this case is remanded to the Office of Environmental Adjudication for further proceedings consistent with this decision.

I. Findings of Fact

Pursuant to Ind. Code § 4-21.5-5-14(c) and Indiana Trial Rule 52(A)(2), the Court sets forth the findings of fact on the material issues on which this decision is based. Pursuant to Ind. Code § 4-21.5-5-11, each of the facts set forth herein are confined to the agency record transmitted to this Court in accordance with Ind. Code 4-21.5-5-13. Each of these facts were supported by specific references to the Administrative Record in Raybestos' brief. Despite the opportunity to do so, IDEM has not disagreed with or challenged any of these facts.

1. In 1996, IDEM alleged that Raybestos Products Company was responsible for the presence of PCBs in Shelly Ditch near Raybestos' Crawfordsville plant. Raybestos entered into an Agreed Order with the agency by which Raybestos agreed to perform a risk-based remediation.

2. The Agreed Order required Raybestos to complete certain sequential steps, obtaining approval from IDEM for each step. Raybestos was required to evaluate the extent of the damage, prepare a Risk Assessment to evaluate the risk posed by the PCBs, prepare a Technical Memorandum defining cleanup goals based on the conclusions of the Risk Assessment, and complete the cleanup.

3. Raybestos prepared and submitted its Baseline Risk Assessment ("Risk Assessment"). The Risk Assessment concluded that the levels of PCBs existing in Shelly Ditch posed no adverse health

risks. IDEM and its outside consultants analyzed the Risk Assessment, held meetings with Raybestos' consultants, and requested and obtained additional information. After 15 months of analyzing the document and its conclusions, on March 16, 1998, IDEM approved Raybestos' Risk Assessment.

4. Based on the Risk Assessment conclusion that the PCBs posed no adverse health risk, Raybestos next submitted its Technical Memorandum. IDEM commented on the proposed Technical Memorandum, and Raybestos addressed each of IDEM's stated concerns, ultimately agreeing to clean all "hot spots" (high levels) to no more than 238 ppm. This means the highest levels would have 238 ppm; levels at other locations would be lower. Raybestos spent $350,000 in preparing and submitting the Technical Memorandum.

5. The IDEM commissioner who signed the Agreed Order was replaced with a new commissioner, John Hamilton. A new assistant commissioner, Mary Beth Tuohy, was brought in from outside the agency to fill that nonmerit position. Responsibility for Shelly Ditch, originally in the Project Management Section, was transferred to Harold Atkinson, an employee in the Site Investigations Section having virtually no experience with risk assessments.

6. Commissioner Hamilton issued a press release criticizing Raybestos for failing to address the PCBs in Shelley Ditch. The newly appointed Assistant Commissioner Tuohy decided that Raybestos'

proposed cleanup level of 238 ppm based on the site specific Risk Assessment would not be approved. She believed it would set a bad precedent because she was not aware of any other sites where IDEM had approved levels that high. She then instructed her new project manager, Harold Atkinson, to disapprove Raybestos' Technical Memorandum, and because it was based on the already approved Risk Assessment, approval of that document had to be "withdrawn."

7. Atkinson sent notices of IDEM's "withdrawal" of approval of the Risk Assessment and disapproval of the Technical Memorandum to Raybestos. Atkinson's notices stated that the action was based upon newly discovered information. In his deposition, however, he testified that he was simply following instructions – there was no new information, just the concern that approval of 238 ppm would set a bad precedent. The concern that 238 ppm would set a bad precedent also was the basis of the disapproval of the Technical Memorandum.

8. After following the Agreed Order's dispute resolution provisions, Raybestos timely sought administrative review challenging IDEM's withdrawal of approval of the Risk Assessment and disapproval of the Technical Memorandum. At a dispute resolution meeting, IDEM said it would not reinstate approval of the Risk Assessment. Raybestos was advised that no PCBs could be present anywhere in the Ditch at levels higher than 1-10 ppm.

II. Proceedings in the Office of Environmental Adjudication

1. Raybestos filed its Petition for Administrative Review and Stay of Effectiveness in the Office of Environmental Adjudication ("OEA") on December 11, 1998. R. 1-6. Raybestos and IDEM filed cross motions for partial summary judgment. R. 383-446; R. 319-382; 124-318. On April 4, 2000, Administrative Law Judge ("ALJ") Linda C. Lasley, entered her "Order Denying Cross Motions for Partial Summary Judgment and Order Scheduling Pre-Hearing Conference." R. 1302-1305. On April 25, 2000, the ALJ issued her "Order Regarding Scheduling and Order Requesting Briefs," in which the ALJ *sua sponte* requested the parties to submit briefs on four issues. Of significance here was Issue No. 1 which read:

> 1. What effect, if any, do the parties believe paragraph 2 of Section 2 of the Agreed Order has on these proceedings? In addressing this issue please consider (a) Ind. Code § 4-21.5-2-2, (b) paragraph 58 of Section 18 of the Agreed Order and (c) Petitioner's Memorandum of Law on Waiver and Construction of Contracts.

R. 1336.

2. Raybestos and IDEM filed responses to the April 25, 2000 Order. The parties stipulated that paragraph 2 of Section 2 of the Agreed Order had no effect on the proceedings. (Raybestos' Submission, R. 1350; IDEM's Submission, R. 1387 ("Raybestos and

IDEM stipulate that paragraph 2 of Section 2 of the Agreed Order has no effect on these proceedings.")).

3. On June 27, 2000, the ALJ entered her "Recommended Order Vacating Denial of Cross Motions for Summary Judgment and Order Recommending Dismissal of Petition for Administrative Review." R. 1394-1398. On September 15, 2000, the Chief Administrative Law Judge, Wayne E. Penrod, entered his "Final Order Modifying Recommended Order." R. 1439-1441. These Orders dismissed Raybestos' action and held as a matter of law that in paragraph 2 of Section 2 of the Agreed Order Raybestos had waived its right to seek review of IDEM's actions, and that the agency properly acted with sound discretion.

4. On October 18, 2000, Raybestos timely filed its Petition for Judicial Review with this Court. On December 11, 2000, IDEM filed its Answer.

III. Standard of Review

An aggrieved party in an administrative appeal may seek judicial review. *Indiana Department of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 103 (Ind. 1993); Ind. Code §§ 4-21.5-1 through 4-21.5-5-16. The legislature has provided the following remedies:

> If the Court finds that a person has been prejudiced under Section 14 (I.C. 4-21.5-5-14) of this Chapter, the Court may set aside an agency action and:

> (1) Remand the case to the agency for further proceedings; or
>
> (2) Compel agency action that has been unreasonably delayed or unlawfully withheld.

Ind. Code § 4-21.5-5-15. Relief shall be granted if the court determines that a person seeking judicial relief has been prejudiced by an agency action that is:

> (1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) Contrary to constitutional right, power, privilege, or immunity;
>
> (3) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (4) Without observance of procedure required by law; or
>
> (5) Unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d).

A trial court gives no deference to an agency's conclusions of law; any agency determination that is not in accordance with the law must be set aside. *Indiana Office of Environmental Adjudication v. Kunz*, 714 N.E.2d 1190, 1193 (Ind. Ct. App. 1999). When the facts are undisputed and the question is whether those facts lead to a particular conclusion, a question of law is presented and the trial court does not defer to agency decision-making. *Id.*

IV. Raybestos Did Not Waive Its Right to Seek Review

Contrary to the rulings of the OEA, section 2 of Paragraph 2 of the Agreed Order cannot be read as a waiver of Raybestos' right to seek review of IDEM's actions in breach of the Agreed Order. The intent of the parties is clear on the face of the document, and made more clear by the fact that IDEM has never challenged Raybestos' right to seek review.

Section XXI of the Agreed Order is entitled "Reservation of Rights" and paragraph 69 states:

> "IDEM and Respondent reserve all rights and defenses they may have pursuant to any available legal authority unless expressly waived herein."

Under this provision, there can be no implied waiver of rights. The ALJ mistakenly held in its *sua sponte* ruling that Raybestos waived its rights in paragraph 2 of Section 2 of the Agreed Order which provides:

> The Respondent agrees to undertake the actions required by the terms and conditions of this Order and to waive its right to administrative review of this Order and agrees not to contest the jurisdiction of IDEM to enter into this Order. . . .

This is standard language affirming that the respondent will not challenge the *entry* of the order. This language is not a waiver of all rights to administrative review of any subsequent action in

breach of the order IDEM might take concerning Shelly Ditch.

"Waiver is an intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it." *Van de Leuv v. Methodist Hospital of Indiana, Inc.*, 642 N.E.2d 531, 533 (Ind. Ct. App. 1994). The burden to prove waiver is on the party who claims it. *Id.* IDEM, the party that would have had the burden of proof on this issue, did not even raise waiver as a defense.

On the issue of waiver, there can be no better evidence of the parties' intent than their stipulation. The parties did not intend for Raybestos to waive its right to seek review of IDEM's actions in breach of the Agreed Order. IDEM and Raybestos stipulated that the language in section 2 of Paragraph 2 of the Agreed Order had no effect on the proceedings before the Administrative Law Judge:

> Raybestos and IDEM stipulate that paragraph 2 of Section 2 of the Agreed Order has no effect on these proceedings.

IDEM's stipulation that the waiver language of paragraph 2 of the Agreed Order had no effect on this proceeding is binding on IDEM. *IDEM v. Adapto, Inc.*, 717 N.E.2d 646, 651 (Ind. Ct. App. 1999). The stipulation was also binding on the Administrative Law Judges. *Wittwer v. Wittwer*, 545 N.E.2d 27, 29 (Ind. Ct. App. 1989) ("Once a stipulation is entered

into between the parties, the facts so stipulated are. conclusive upon both the parties and the tribunal.").

Raybestos did not waive its right to seek review of IDEM's breaches of the Agreed Order. The ruling of the ALJ to the contrary is erroneous as a matter of both fact and law.

V. IDEM Lacked Authority Under the Agreed Order to Withdraw Approval of the Risk Assessment

IDEM was required under the Agreed Order to approve or disapprove the Risk Assessment. More than a year after submittal of the Risk Assessment, and after written comments and revisions were made, IDEM approved the Risk Assessment. The Agreed Order does not permit IDEM to unilaterally "withdraw" approval later. IDEM has not shown that it was otherwise authorized to withdraw approval. IDEM acted contrary to the Agreed Order and without authority when it withdrew approval of the Risk Assessment.

VI. The Decision to Withdraw Approval of the Risk Assessment and Disapprove the Technical Memorandum was Arbitrary and Capricious and Unsupported by Substantial Evidence

After extended review, IDEM approved the Risk Assessment on March 16, 1998. New IDEM personnel assigned to the Shelly Ditch project arbitrarily

"withdrew" approval of the Risk Assessment, although there was nothing wrong with the report. The agency then used the withdrawal of approval as the basis for disapproving the Technical Memorandum. IDEM personnel have testified, and IDEM does not dispute, that the withdrawal was based upon a single consideration having nothing to do with the specifics of the Risk Assessment: IDEM did not want to set a "precedent" by allowing the maximum level proposed by Raybestos. IDEM did not rely on any site-specific evidence about the Shelly Ditch. Because the agency's "actual" reason had nothing to do with the content of the site-specific Risk Assessment itself, or the related Technical Memorandum, the decision to withdraw approval of the Risk Assessment and disapprove the Technical Memorandum was in violation of the Agreed Order and was arbitrary and capricious and must be reversed. The "arbitrary and capricious" standard has been explained as follows:

> Arbitrary and capricious action by an administrative agency is action taken, in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.

Indiana Civil Rights Commission v. Sutherland, 182 Ind. App. 133, 145, 394 N.E.2d 949, 957 (1979). IDEM did not apply the right standard (a site specific assessment), but applied an arbitrary standard (an extrapolation from sites not anything like the Raybestos site). Because IDEM acted arbitrarily, and

its decision is not supported by any substantial evidence, its decisions must be set aside. *County Department of Public Welfare v. Deaconess Hospital, Inc.*, 588 N.E.2d 1322, 1326 (Ind. App. 1992).

VII. The Issues Are Not Moot

IDEM has asserted that this case and the issues presented to this Court are moot. IDEM relies upon a document purporting to be an Unilateral Administrative Order ("UAO") issued by the United States Environmental Protection Agency. This UAO is not in the administrative record. The facts relied upon by IDEM are not supported by affidavit or other admissible evidence. At oral argument Raybestos pointed out – and IDEM did not disagree – that any "mootness" claim should have been made months ago during the pendency of the administrative proceeding when IDEM referred this matter back to the EPA. IDEM has presented no reason why this claim may be made or the new evidence may be received by this Court under Ind. Code § 4-21.5-5-10, 11 and 12. Based on the agency record and the admissible evidence, this Court finds that Raybestos is entitled to relief, and the issues are not moot. At oral argument Raybestos pointed our [sic] several reasons why Raybestos' petition is not moot. Here again, IDEM did not contest these reasons. But even if Raybestos' claims could be considered moot, this case should not be dismissed. "Indiana courts have long recognized that a case may be decided on its merits under an exception to the general rule when the case

involves questions of 'great public interest.'" *Matter of Lawrance*, 579 N.E.2d. 32, 37 (Ind. 1991). Cases found to fall within the public interest exception typically contained issues likely to recur. *Id.* The Court finds that this case is not moot, and in any event, presents issues of great public interest – most especially whether IDEM will be required to adhere to the terms of Agreed Orders it enters – that, if not addressed, are likely to recur.

VIII. Order and Final Judgment

The Court finds that Raybestos has been prejudiced by the actions of IDEM pursuant to Ind. Code § 4-21.5-5-14(d). Specifically, Raybestos has been prejudiced by the agency's breaches of the Agreed Order in withdrawing approval of the Risk Assessment and disapproving the Technical Memorandum and other unlawful actions. Approval of the Risk Assessment should be reinstated, and the Technical Memorandum should be approved. Accordingly, for each of the reasons set forth herein, and pursuant to Ind. Code § 4-21.5-5-15, the actions of IDEM and the Office of Environmental Adjudication described herein are set aside. Approval of the Risk Assessment should be reinstated, and approval of the Technical Memorandum should be entered. This matter is remanded to the Office of Environmental Adjudication for further proceedings consistent with this decision.

Pursuant to Trial Rule 54(B), the Court determines that there is no just reason for delay and directs entry of this order as a final judgment.

ENTERED this 1st day of June, 2001.

By /s/ Michael D. Keele
Judge Michael D. Keele,
Marion County Superior
Court F-12, Environmental
Court

Copies sent to:

All counsel of record

Supreme Court of Indiana.
THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Appellant (Defendant below),
v.
RAYBESTOS PRODUCTS COMPANY, Appellee (Plaintiff below).
No. 49S02-0804-CV-183.

March 31, 2009.

Appeal from the Marion Superior Court; No. 49D12-0209-PL-1553; The Honorable Robyn Moberly, Judge.

Gregory F. Zoeller, Attorney General of Indiana, David L. Steiner, Frances H. Barrow, Timothy J. Junk, Deputy Attorney Generals, Indianapolis, IN, Attorneys for Appellant.

George M. Plews, Brett E. Nelson, Indianapolis, IN, Attorneys for Appellee.

On Petition for Rehearing

BOEHM, Justice.

Raybestos has petitioned for rehearing from this Court's December 9, 2008 opinion. Raybestos points out that the opinion incorrectly states the standard of review used by the Office of Environmental Adjudication in reviewing an action of IDEM. The first full paragraph of page 475 of 897 N.E.2d 469 states that OEA uses the standard of review provided by Indiana Code section 4-21.5-5-14 and may provide relief as

permitted by section 4-21.5-5-15. Raybestos rightly points out that these statutes apply to judicial, not administrative review. We grant rehearing for the limited purpose of correcting this error and otherwise deny Raybestos's Petition for Rehearing.

SHEPARD, C.J., and DICKSON, SULLIVAN, and RUCKER, JJ., concur.

Constitution of the United States

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IC 4-21.5-2

Chapter 2. Application

IC 4-21.5-2-1
Minimum rights and duties

Sec. 1. This article creates minimum procedural rights and imposes minimum procedural duties.

As added by P.L.18-1986, SEC.1.

IC 4-21.5-2-2
Waiver of rights and duties

Sec. 2. Except to the extent precluded by a law, a person may waive any right conferred upon that person by this article. This section does not permit the waiver of any procedural duty imposed by this article.

As added by P.L.18-1986, SEC.1.

IC 4-21.5-2-3
Application of law

Sec. 3. This article applies to an agency, except to the extent that a statute clearly and specifically provides otherwise. This article applies (to the extent that a statute other than this article specifically applies this article) to a class of otherwise exempt orders or one (1) or more stages of an otherwise exempt proceeding.

As added by P.L.18-1986, SEC.1.

IC 4-21.5-2-4
Exemptions

Sec. 4. (a) This article does not apply to any of the following agencies:

(1) The governor.

(2) The state board of accounts.

(3) The state educational institutions.

(4) The department of workforce development.

(5) The unemployment insurance review board of the department of workforce development.

(6) The worker's compensation board of Indiana.

(7) The military officers or boards.

(8) The Indiana utility regulatory commission.

(9) The department of state revenue (excluding an agency action related to the licensure of private employment agencies).

(10) The department of local government finance.

(11) The Indiana board of tax review.

(b) This article does not apply to action related to railroad rate and tariff regulation by the Indiana department of transportation.

As added by P.L.18-1986, SEC.1. Amended by P.L.18-1987, SEC.5; P.L.28-1988, SEC.1; P.L.18-1990, SEC.7; P.L.21-1995, SEC.7; P.L.198-2001, SEC.1;

P.L.256-2003, SEC.1; P.L.188-2003, SEC.1; P.L.91-2006, SEC.1; P.L.2-2007, SEC.51; P.L.219-2007, SEC.3.

IC 4-21.5-2-5
Exemptions; agency actions

Sec. 5. This article does not apply to the following agency actions:

(1) The issuance of a warrant or jeopardy warrant for the collection of taxes.

(2) A determination of probable cause or no probable cause by the civil rights commission.

(3) A determination in a factfinding conference of the civil rights commission.

(4) A personnel action, except review of a personnel action by the state employees appeals commission under IC 4-15-2 or a personnel action that is not covered by IC 4-15-2 but may be taken only for cause.

(5) A resolution, directive, or other action of any agency that relates solely to the internal policy, organization, or procedure of that agency or another agency and is not a licensing or enforcement action. Actions to which this exemption applies include the statutory obligations of an agency to approve or ratify an action of another agency.

(6) An agency action related to an offender within the jurisdiction of the department of correction.

(7) A decision of the Indiana economic development corporation, the office of tourism development, the department of environmental management, the tourist information and grant fund review committee (before the repeal of the statute that created the tourist information and grant fund review committee), the Indiana finance authority, the corporation for innovation development, or the lieutenant governor that concerns a grant, loan, bond, tax incentive, or financial guarantee.

(8) A decision to issue or not issue a complaint, summons, or similar accusation.

(9) A decision to initiate or not initiate an inspection, investigation, or other similar inquiry that will be conducted by the agency, another agency, a political subdivision, including a prosecuting attorney, a court, or another person.

(10) A decision concerning the conduct of an inspection, investigation, or other similar inquiry by an agency.

(11) The acquisition, leasing, or disposition of property or procurement of goods or services by contract.

(12) Determinations of the department of workforce development under IC 22-4-18-1(g)(1) or IC 22-4-41.

(13) A decision under IC 9-30-12 of the bureau of motor vehicles to suspend or revoke a driver's license, a driver's permit, a vehicle title, or a vehicle registration of an individual who presents a dishonored check.

(14) An action of the department of financial institutions under IC 28-1-3.1 or a decision of the department of financial institutions to act under IC 28-1-3.1.

(15) A determination by the NVRA official under IC 3-7-11 concerning an alleged violation of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg) or IC 3-7.

(16) Imposition of a civil penalty under IC 4-20.5-6-8 if the rules of the Indiana department of administration provide an administrative appeals process.

(17) A determination of status as a member of or participant in an environmental performance based program developed and implemented under IC 13-27-8.

As added by P.L.18-1986, SEC.1. Amended by P.L.29-1988, SEC.1; P.L.3-1989, SEC.23; P.L.35-1989, SEC.1; P.L.1-1990, SEC.34; P.L.23-1990, SEC.1; P.L.11-1990, SEC.103; P.L.10-1991, SEC.6; P.L.2-1991, SEC.20; P.L.11-1991, SEC.20; P.L.12-1995, SEC.95; P.L.21-1995, SEC.8; P.L.2-1996, SEC.211; P.L.172-1999, SEC.10; P.L.4-2005, SEC.19; P.L.229-2005, SEC.1; P.L.235-2005, SEC.60; P.L.1-2006, SEC.70; P.L.161-2006, SEC.1; P.L.100-2006, SEC.1; P.L.1-2007, SEC.16.

IC 4-21.5-2-6
Inapplicablility to certain formulation, issuance, and administrative review

Sec. 6. This article does not apply to the formulation, issuance, or administrative review (but does apply to the judicial review and civil enforcement) of any of the following:

(1) Except as provided in IC 12-17.2-4-18.7 and IC 12-17.2-5-18.7, determinations by the division of family resources and the department of child services.

(2) Determinations by the alcohol and tobacco commission.

(3) Determinations by the office of Medicaid policy and planning concerning recipients and applicants of Medicaid. However, this article does apply to determinations by the office of Medicaid policy and planning concerning providers.

As added by P.L.18-1986, SEC.1. Amended by P.L.2-1992, SEC.37; P.L.23-1992, SEC.1; P.L.1-1993, SEC.20; P.L.204-2001, SEC.5; P.L.198-2001, SEC.2; P.L.1-2002, SEC.9; P.L.241-2003, SEC.1; P.L.234-2005, SEC.1; P.L.219-2007, SEC.4.

IC 4-21.5-3

Chapter 3. Adjudicative Proceedings

IC 4-21.5-3-4
Notice required; licenses and personnel decisions; persons who must be notified; contents

Sec. 4. (a) Notice must be given under this section concerning the following:

(1) The grant, renewal, restoration, transfer, or denial of a license by the bureau of motor vehicles under IC 9.

(2) The grant, renewal, restoration, transfer, or denial of a noncommercial fishing or hunting license by the department of natural resources under IC 14.

(3) The grant, renewal, restoration, transfer, or denial of a license by a board described in IC 25-1-8-1.

(4) The grant, renewal, suspension, revocation, or denial of a certificate of registration under IC 25-5.2.

(5) A personnel decision by an agency.

(6) The grant, renewal, restoration, transfer, or denial of a license by the department of environmental management or the commissioner of the department under the following:

(A) Environmental management laws (as defined in IC 13-11-2-71) for the construction, installation, or modification of:

(i) sewers and appurtenant facilities, devices, or structures for the collection and transport of sewage (as defined in IC 13-11-2-200) or storm water to a

storage or treatment facility or to a point of discharge into the environment; or

(ii) pipes, pumps, and appurtenant facilities, devices, or structures that are part of a public water system (as defined in IC 13-11-2-177.3) and that are used to transport water to a storage or treatment facility or to distribute water to the users of the public water system;

where a federal, state, or local governmental body has given or will give public notice and has provided or will provide an opportunity for public participation concerning the activity that is the subject of the license.

(B) Environmental management laws (as defined in IC 13-11-2-71) for the registration of a device or a piece of equipment.

(C) IC 13-17-6-1 for a person to engage in the inspection, management, and abatement of asbestos containing material.

(D) IC 13-18-11 for a person to operate a wastewater treatment plant.

(E) IC 13-15-10 for a person to operate the following:

(i) A solid waste incinerator or a waste to energy facility.

(ii) A land disposal site.

(iii) A facility described under IC 13-15-1-3 whose operation could have an

adverse impact on the environment if not operated properly.

(F) IC 13-20-4 for a person to operate a municipal waste collection and transportation vehicle.

(b) When an agency issues an order described by subsection (a), the agency shall give a written notice of the order to the following persons:

(1) Each person to whom the order is specifically directed.

(2) Each person to whom a law requires notice to be given. A person who is entitled to notice under this subsection is not a party to any proceeding resulting from the grant of a petition for review under section 7 of this chapter unless the person is designated as a party on the record of the proceeding.

(c) The notice must include the following:

(1) A brief description of the order.

(2) A brief explanation of the available procedures and the time limit for seeking administrative review of the order under section 7 of this chapter.

(3) Any information required by law.

(d) An order under this section is effective when it is served. However, if a timely and sufficient application has been made for renewal of a license described by subsection (a)(3) and review is granted under section 7 of this chapter, the existing license

does not expire until the agency has disposed of the proceeding under this chapter concerning the renewal, unless a statute other than this article provides otherwise. This subsection does not preclude an agency from issuing under IC 4-21.5-4 an emergency or other temporary order with respect to the license.

(e) If a petition for review of an order described in subsection (a) is filed within the period set by section 7 of this chapter and a petition for stay of effectiveness of the order is filed by a party or another person who has a pending petition for intervention in the proceeding, an administrative law judge shall, as soon as practicable, conduct a preliminary hearing to determine whether the order should be stayed in whole or in part. The burden of proof in the preliminary hearing is on the person seeking the stay. The administrative law judge may stay the order in whole or in part. The order concerning the stay may be issued after an order described in subsection (a) becomes effective. The resulting order concerning the stay shall be served on the parties and any person who has a pending petition for intervention in the proceeding. It must include a statement of the facts and law on which it is based.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1989, SEC.3; P.L.25-1991, SEC.1; P.L.33-1993, SEC.1; P.L.1-1996, SEC.25; P.L.54-2001, SEC.2; P.L.184-2002, SEC.1.

IC 4-21.5-3-5

Notice required; certain licensing and other decisions; persons who must be notified; contents; effectiveness of order; stays

Sec. 5. (a) Notice shall be given under this section concerning the following:

(1) The grant, renewal, restoration, transfer, or denial of a license not described by section 4 of this chapter.

(2) The approval, renewal, or denial of a loan, grant of property or services, bond, financial guarantee, or tax incentive.

(3) The grant or denial of a license in the nature of a variance or exemption from a law.

(4) The determination of tax due or other liability.

(5) A determination of status.

(6) Any order that does not impose a sanction or terminate a legal right, duty, privilege, immunity, or other legal interest.

(b) When an agency issues an order described in subsection (a), the agency shall give a written notice of the order to the following persons:

(1) Each person to whom the order is specifically directed.

(2) Each person to whom a law requires notice to be given.

(3) Each competitor who has applied to the agency for a mutually exclusive license, if issuance is the subject of the order and the competitor's application has not been denied in an order for which all rights to judicial review have been waived or exhausted.

(4) Each person who has provided the agency with a written request for notification of the order, if the request:

(A) describes the subject of the order with reasonable particularity; and

(B) is delivered to the agency at least seven (7) days before the day that notice is given under this section.

(5) Each person who has a substantial and direct proprietary interest in the subject of the order.

(6) Each person whose absence as a party in the proceeding concerning the order would deny another party complete relief in the proceeding or who claims an interest related to the subject of the order and is so situated that the disposition of the matter, in the person's absence, may:

(A) as a practical matter impair or impede the person's ability to protect that interest; or

(B) leave any other person who is a party to a proceeding concerning the order subject to a substantial risk of incurring multiple or otherwise inconsistent obligations by reason of the person's claimed interest.

A person who is entitled to notice under this subsection is not a party to any proceeding resulting from the grant of a petition for review under section 7 of this chapter unless the person is designated as a party in the record of the proceeding.

(c) The notice required by subsection (a) must include the following:

(1) A brief description of the order.

(2) A brief explanation of the available procedures and the time limit for seeking administrative review of the order under section 7 of this chapter.

(3) A brief explanation of how the person may obtain notices of any prehearing conferences, preliminary hearings, hearings, stays, and any orders disposing of the proceedings without intervening in the proceeding, if a petition for review is granted under section 7 of this chapter.

(4) Any other information required by law.

(d) An agency issuing an order under this section or conducting an administrative review of the order shall give notice of any:

(1) prehearing conference;

(2) preliminary hearing;

(3) hearing;

(4) stay; or

(5) order disposing of all proceedings;

concerning the order to a person notified under subsection (b) who requests these notices in the manner specified under subsection (c)(3).

(e) If a statute requires an agency to solicit comments from the public in a nonevidentiary public hearing before issuing an order described by subsection (a), the agency shall announce at the opening and the close of the public hearing how a person may receive notice of the order under subsection (b)(4).

(f) If a petition for review and a petition for stay of effectiveness of an order described in subsection (a) has not been filed, the order is effective fifteen (15) days (or any longer period during which a person may, by statute, seek administrative review of the order) after the order is served. If both a petition for review and a petition for stay of effectiveness are filed before the order becomes effective, any part of the order that is within the scope of the petition for stay is stayed for an additional fifteen (15) days. Any part of the order that is not within the scope of the petition is not stayed. The order takes effect regardless of whether the persons described by subsection (b)(5) or (b)(6) have been served. An agency shall make a good faith effort to identify and notify these persons, and the agency has the burden of persuasion that it has done so. The agency may request that the applicant for the order assist in the identification of these persons. Failure to notify any of these persons is not grounds for invalidating an order, unless an unnotified person is substantially prejudiced by the lack of notice. The burden of

persuasion as to substantial prejudice is on the unnotified person.

(g) If a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature and review is granted under section 7 of this chapter, the existing license does not expire until the agency has disposed of a proceeding under this chapter concerning the renewal, unless a statute other than this article provides otherwise. This subsection does not preclude an agency from issuing, under IC 4-21.5-4, an emergency or other temporary order with respect to the license.

(h) On the motion of any party or other person having a pending petition for intervention in the proceeding, an administrative law judge shall, as soon as practicable, conduct a preliminary hearing to determine whether the order should be stayed. The burden of proof in the preliminary hearing is on the person seeking the stay. The administrative law judge may stay the order in whole or in part. The order concerning the stay may be issued before or after the order described in subsection (a) becomes effective. The resulting order concerning the stay shall be served on the parties, any person who has a pending petition for intervention in the proceeding, and any person who has requested notice under subsection (d). It must include a statement of the facts and law on which it is based.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1987, SEC.4.

IC 4-21.5-3-6
Notice required; persons who must receive notice; contents; effectiveness of order; stay, preliminary hearing, and resulting order

Sec. 6. (a) Notice shall be given under this section concerning the following:

(1) A safety order under IC 22-8-1.1.

(2) Any order that:

(A) imposes a sanction on a person or terminates a legal right, duty, privilege, immunity, or other legal interest of a person;

(B) is not described in section 4 or 5 of this chapter or IC 4-21.5-4; and

(C) by statute becomes effective without a proceeding under this chapter if there is no request for a review of the order within a specified period after the order is issued or served.

(3) A notice of program reimbursement or equivalent determination or other notice regarding a hospital's reimbursement issued by the office of Medicaid policy and planning or by a contractor of the office of Medicaid policy and planning regarding a hospital's year end cost settlement.

(4) A determination of audit findings or an equivalent determination by the office of Medicaid policy and planning or by a contractor of the office of Medicaid policy and planning arising from a Medicaid postpayment or concurrent audit of a hospital's Medicaid claims.

(5) A license revocation under:

(A) IC 24-4.5-3;

(B) IC 28-1-29;

(C) IC 28-7-5;

(D) IC 28-8-4; or

(E) IC 28-8-5.

(b) When an agency issues an order described by subsection (a), the agency shall give notice to the following persons:

(1) Each person to whom the order is specifically directed.

(2) Each person to whom a law requires notice to be given.

A person who is entitled to notice under this subsection is not a party to any proceeding resulting from the grant of a petition for review under section 7 of this chapter unless the person is designated as a party in the record of the proceeding.

(c) The notice must include the following:

(1) A brief description of the order.

(2) A brief explanation of the available procedures and the time limit for seeking administrative review of the order under section 7 of this chapter.

(3) Any other information required by law.

(d) An order described in subsection (a) is effective fifteen (15) days after the order is served, unless a statute other than this article specifies a different date or the agency specifies a later date in its order. This subsection does not preclude an agency from issuing, under IC 4-21.5-4, an emergency or other temporary order concerning the subject of an order described in subsection (a).

(e) If a petition for review of an order described in subsection (a) is filed within the period set by section 7 of this chapter and a petition for stay of effectiveness of the order is filed by a party or another person who has a pending petition for intervention in the proceeding, an administrative law judge shall, as soon as practicable, conduct a preliminary hearing to determine whether the order should be stayed in whole or in part. The burden of proof in the preliminary hearing is on the person seeking the stay. The administrative law judge may stay the order in whole or in part. The order concerning the stay may be issued after an order described in subsection (a) becomes effective. The resulting order concerning the stay shall be served on the parties and any person who has a pending petition for intervention in the proceeding. It must include a statement of the facts and law on which it is based.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1987, SEC.5; P.L.42-1995, SEC.2; P.L.80-1998, SEC.1.

IC 4-21.5-3-8
Sanctions; temporary orders

Sec. 8. (a) An agency may issue a sanction or terminate a legal right, duty, privilege, immunity, or other legal interest not described by section 4, 5, or 6 of this chapter only after conducting a proceeding under this chapter. However, this subsection does not preclude an agency from issuing, under IC 4-21.5-4, an emergency or other temporary order concerning the subject of the proceeding.

(b) When an agency seeks to issue an order that is described by subsection (a), the agency shall serve a complaint upon:

(1) each person to whom any resulting order will be specifically directed; and

(2) any other person required by law to be notified.

A person notified under this subsection is not a party to the proceeding unless the person is a person against whom any resulting order will be specifically directed or the person is designated by the agency as a party in the record of the proceeding.

(c) The complaint required by subsection (b) must include the following:

(1) A short, plain statement showing that the pleader is entitled to an order.

(2) A demand for the order that the pleader seeks.

As added by P.L.18-1986, SEC.1.

IC 4-21.5-5

Chapter 5. Judicial Review

IC 4-21.5-5-1
Exclusive means for judicial review; exceptions

Sec. 1. Except as provided in IC 22-9 and IC 22-9.5, this chapter establishes the exclusive means for judicial review of an agency action. However, a subpoena, discovery order, or protective order issued under this article may be contested only in an action for civil enforcement under IC 4-21.5-6-2.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1987, SEC.17; P.L.14-1994, SEC.1.

IC 4-21.5-5-2
Petition; persons entitled to judicial review

Sec. 2. (a) Judicial review is initiated by filing a petition for review in the appropriate court.

(b) Only a person who qualifies under:

(1) section 3 of this chapter concerning standing;

(2) section 4 of this chapter concerning exhaustion of administrative remedies;

(3) section 5 of this chapter concerning the time for filing a petition for review;

(4) section 13 of this chapter concerning the time for filing the agency record for review; and

(5) any other statute that sets conditions for the availability of judicial review;

is entitled to review of a final agency action.

(c) A person is entitled to judicial review of a nonfinal agency action only if the person establishes both of the following:

(1) Immediate and irreparable harm.

(2) No adequate remedy exists at law. (The failure of a person to comply with the procedural requirements of this article may not be the basis for a finding of an inadequate remedy at law.)

As added by P.L.18-1986, SEC.1.

IC 4-21.5-5-3
Standing

Sec. 3. (a) The following have standing to obtain judicial review of an agency action:

(1) A person to whom the agency action is specifically directed.

(2) A person who was a party to the agency proceedings that led to the agency action.

(3) A person eligible for standing under a law applicable to the agency action.

(4) A person otherwise aggrieved or adversely affected by the agency action.

(b) A person has standing under subsection (a)(4) only if:

(1) the agency action has prejudiced or is likely to prejudice the interests of the person;

(2) the person:

(A) was eligible for an initial notice of an order or proceeding under this article, was not notified of the order or proceeding in substantial compliance with this article, and did not have actual notice of the order or proceeding before the last date in the proceeding that the person could object or otherwise intervene to contest the agency action; or

(B) was qualified to intervene to contest an agency action under IC 4-21.5-3-21(a), petitioned for intervention in the proceeding, and was denied party status;

(3) the person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(4) a judgment in favor of the person would substantially eliminate or redress the prejudice to the person caused or likely to be caused by the agency action.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1987, SEC.18; P.L.178-2002, SEC.1; P.L.219-2007, SEC.5.

IC 4-21.5-5-4
Exhaustion of administrative remedies; waiver of right to review

Sec. 4. (a) A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review.

(b) A person who:

(1) fails to timely object to an order or timely petition for review of an order within the period prescribed by this article; or

(2) is in default under this article;

has waived the person's right to judicial review under this chapter.

As added by P.L.18-1986, SEC.1.

IC 4-21.5-5-5
Time for filing

Sec. 5. Except as otherwise provided, a petition for review is timely only if it is filed within thirty (30) days after the date that notice of the agency action that is the subject of the petition for judicial review was served.

As added by P.L.18-1986, SEC.1.

IC 4-21.5-5-6
Venue

Sec. 6. (a) Venue is in the judicial district where:

(1) the petitioner resides or maintains a principal place of business;

(2) the agency action is to be carried out or enforced; or

(3) the principal office of the agency taking the agency action is located.

(b) If more than one (1) person may be aggrieved by the agency action, only one (1) proceeding for review may be had, and the court in which a petition for review is first properly filed has jurisdiction.

(c) The rules of procedure governing civil actions in the courts govern pleadings and requests under this chapter for a change of judge or change of

venue to another judicial district described in subsection (a).

(d) Each person who was a party to the proceeding before the agency is a party to the petition for review.

As added by P.L.18-1986, SEC.1. Amended by P.L.198-2001, SEC.3; P.L.219-2007, SEC.6.

IC 4-21.5-5-7
Petition; filing; contents

Sec. 7. (a) A petition for review must be filed with the clerk of the court.

(b) A petition for review must be verified and set forth the following:

(1) The name and mailing address of the petitioner.

(2) The name and mailing address of the agency whose action is at issue.

(3) Identification of the agency action at issue, together with a copy, summary, or brief description of the agency action.

(4) Identification of persons who were parties in any proceedings that led to the agency action.

(5) Specific facts to demonstrate that the petitioner is entitled to obtain judicial review under section 2 of this chapter.

(6) Specific facts to demonstrate that the petitioner has been prejudiced by one (1) or more of the grounds described in section 14 of this chapter.

(7) A request for relief, specifying the type and extent of relief requested.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1987, SEC.19.

IC 4-21.5-5-8
Service; rules of procedure

Sec. 8. (a) A petitioner for judicial review shall serve a copy of the petition upon:

(1) the ultimate authority issuing the order;

(2) the ultimate authority for each other agency exercising administrative review of the order;

(3) the attorney general; and

(4) each party to the proceeding before an agency;

in the manner provided by the rules of procedure governing civil actions in the courts. If the ultimate authority consists of more than one (1) individual, service on the ultimate authority must be made to the secretary or chairperson of the ultimate authority.

(b) The petitioner shall use means provided by the rules of procedure governing civil actions in the courts to give notice of the petition for review to all

other parties in any proceedings that led to the agency action.

As added by P.L.18-1986, SEC.1.

IC 4-21.5-5-9
Stay of order pending court decision

Sec. 9. (a) If a petition for judicial review concerns a matter other than an assessment or determination of tax due or claimed to be due the state, and the law concerning the agency whose order is being reviewed does not preclude a stay of the order by the court, the person seeking the review may seek, by filing a verified petition, an order of the court staying the action of the agency pending decision by the court. The court may enter an order staying the agency order pending a final determination if:

(1) the court finds that the petition for review and the petition for a stay order show a reasonable probability that the order or determination appealed from is invalid or illegal; and

(2) a bond is filed that is conditioned upon the due prosecution of the proceeding for review and that the petitioner will pay all court costs and abide by the order of the agency if it is not set aside. The bond must be in the amount and with the surety approved by the court. However, the amount of the bond must be at least five hundred dollars ($500).

(b) If a petition for review concerns a revocation or suspension of a license and the law governing the agency permits a staying of the action of the agency by court order pending judicial review, any stay ordered under subsection (a) is effective during the period of the review and any appeal from the review and until the review is finally determined, unless otherwise ordered by the court granting the stay. If the stay is granted as provided in this section and the determination of the agency is approved on final determination, the revocation or suspension of the license immediately becomes effective.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1987, SEC.20.

IC 4-21.5-5-10
Issues not raised before agency

Sec. 10. A person may obtain judicial review of an issue that was not raised before the agency, only to the extent that:

(1) the issue concerns whether a person who was required to be notified by this article of the commencement of a proceeding was notified in substantial compliance with this article; or

(2) the interests of justice would be served by judicial resolution of an issue arising from

a change in controlling law occurring after the agency action.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1987, SEC.21.

IC 4-21.5-5-11
Fact issues confined to record

Sec. 11. Judicial review of disputed issues of fact must be confined to the agency record for the agency action supplemented by additional evidence taken under section 12 of this chapter. The court may not try the cause de novo or substitute its judgment for that of the agency.

As added by P.L.18-1986, SEC.1.

IC 4-21.5-5-12
Evidence; remand to agency for further fact-finding

Sec. 12. (a) The court may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding one (1) or both of the following:

(1) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action.

(2) Unlawfulness of procedure or of decision-making process.

This subsection applies only if the additional evidence could not, by due diligence, have been discovered and raised in the administrative proceeding giving rise to a proceeding for judicial review.

(b) The court may remand a matter to the agency before final disposition of a petition for review with directions that the agency conduct further factfinding or that the agency prepare an adequate record, if:

(1) the agency failed to prepare or preserve an adequate record;

(2) the agency improperly excluded or omitted evidence from the record; or

(3) a relevant law changed after the agency action and the court determines that the new provision of law may control the outcome.

As added by P.L.18-1986, SEC.1.

IC 4-21.5-5-13
Transmittal of agency record; costs; corrections or additions

Sec. 13. (a) Within thirty (30) days after the filing of the petition, or within further time allowed by the court or by other law, the petitioner shall transmit to the court the original or a certified copy of

the agency record for judicial review of the agency action, consisting of:

(1) any agency documents expressing the agency action;

(2) other documents identified by the agency as having been considered by it before its action and used as a basis for its action; and

(3) any other material described in this article as the agency record for the type of agency action at issue, subject to this section.

(b) An extension of time in which to file the record shall be granted by the court for good cause shown. Inability to obtain the record from the responsible agency within the time permitted by this section is good cause. Failure to file the record within the time permitted by this subsection, including any extension period ordered by the court, is cause for dismissal of the petition for review by the court, on its own motion, or on petition of any party of record to the proceeding.

(c) Upon a written request by the petitioner, the agency taking the action being reviewed shall prepare the agency record for the petitioner. If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties to the judicial review proceeding stipulate to omit in accordance with subsection (e).

(d) Notwithstanding IC 5-14-3-8, the agency shall charge the petitioner with the reasonable cost of preparing any necessary copies and transcripts for transmittal to the court, unless a person files with the court, under oath and in writing, the statement described by IC 33-37-3-2.

(e) By stipulation of all parties to the review proceedings, the record may be shortened, summarized, or organized.

(f) The court may tax the cost of preparing transcripts and copies for the record:

(1) against a party to the judicial review proceeding who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(2) in accordance with the rules governing civil actions in the courts or other law.

(g) Additions to the record concerning evidence received under section 12 of this chapter must be made as ordered by the court. The court may require or permit subsequent corrections or additions to the record.

As added by P.L.18-1986, SEC.1. Amended by P.L.11-1987, SEC.6; P.L.3-1989, SEC.24; P.L.98-2004, SEC.47.

IC 4-21.5-5-14
Burden of proof; standards of review

Sec. 14. (a) The burden of demonstrating the invalidity of agency action is on the party to the judicial review proceeding asserting invalidity.

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.

(c) The court shall make findings of fact on each material issue on which the court's decision is based.

(d) The court shall grant relief under section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law; or

(5) unsupported by substantial evidence.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1987, SEC.22.

IC 4-21.5-5-15
Disposition

Sec. 15. If the court finds that a person has been prejudiced under section 14 of this chapter, the court may set aside an agency action and:

(1) remand the case to the agency for further proceedings; or

(2) compel agency action that has been unreasonably delayed or unlawfully withheld.

As added by P.L.18-1986, SEC.1. Amended by P.L.35-1987, SEC.23.

IC 4-21.5-5-16
Decisions on petitions; appeal

Sec. 16. Decisions on petitions for review of agency action are appealable in accordance with the rules governing civil appeals from the courts.

As added by P.L.18-1986, SEC.1.

IC 13-25-4

Chapter 4. Hazardous Substances Response Trust Fund

IC 13-25-4-1
Establishment; purpose

Sec. 1. (a) The hazardous substances response trust fund is established. The purpose of the fund is

to accumulate and maintain a source of money for the following purposes:

(1) Financing contracts or cooperative agreements between the state and the President of the United States under Section 104 of CERCLA (42 U.S.C. 9604).

(2) Providing state assistance in the form of supplies, materials, services, and equipment to:

(A) prevent the release of a hazardous substance or contaminant; or

(B) control, contain, isolate, neutralize, remove, store, or dispose of any hazardous substance or contaminant already released into or on the air, land, or waters of Indiana.

(3) Financing response actions that are:

(A) undertaken or authorized by the commissioner with respect to sites in Indiana; and

(B) considered by the commissioner to be necessary to protect the public health or welfare or the environment from the release or threatened release of a hazardous substance or contaminant.

(4) Paying expenses related to releases of regulated substances other than petroleum from underground storage tanks under IC 13-23-13-7.

(5) Paying administrative and personnel expenses incurred by the state in responding to releases or threats of releases of hazardous substances or contaminants.

(6) Paying claims for the reimbursement of necessary response costs incurred by persons that have received preauthorization from the commissioner for reimbursement.

(7) Providing grants for household hazardous waste and conditionally exempt small quantity generator waste collection, recycling, or disposal projects under IC 13-20-20.

(8) Paying administrative and personnel expenses incurred by the department in implementing and administering household hazardous waste and conditionally exempt small quantity generator waste collection, recycling, or disposal projects under IC 13-20-20.

(9) Transferring funds to the environmental remediation revolving loan fund established by IC 13-19-5-2.

(b) Money in the fund at the end of a state fiscal year does not revert to the state general fund.

As added by P.L.1-1996, SEC.15. Amended by P.L.59-1997, SEC.14; P.L.237-1999, SEC.10.

IC 13-25-4-2
Sources of fund

Sec. 2. The sources of money for the fund are the following:

(1) Revenue produced by the levy under IC 6-6-6.6.

(2) Any payment to the state or the fund as:

(A) reimbursement for amounts expended by the state in a response action; or

(B) a settlement or judgment stemming from a lawsuit by the state or federal government to recover amounts expended by the state in a response action, including recoveries under section 10 of this chapter.

(3) Accrued interest and other investment earnings of the fund.

(4) Fees paid under IC 13-23-12-4(2) and penalties paid under IC 13-23-12-7 by owners and operators of underground storage tanks used to contain regulated substances other than petroleum.

(5) Appropriations made by the general assembly and gifts and donations from private and public entities intended for deposit in the fund.

(6) Grants and other payments made by the United States government under:

(A) the federal Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) in relation to regulated substances other than petroleum; or

(B) CERCLA.

(7) Money received from responsible parties under agreements under section 23 of this chapter for response actions at specific sites.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-3
Investments

Sec. 3. The treasurer of state shall invest the assets of the fund:

(1) as a whole; and

(2) in the investments that are authorized by the Constitution of the State of Indiana and state laws.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-4
Annual budget; expenditures; household hazardous waste grants

Sec. 4. (a) The department shall do the following:

(1) Prepare an annual budget to provide for administrative and personnel expenses from the fund.

(2) Submit the budget to the budget committee in accordance with IC 4-12-1.

(b) The general assembly must appropriate the money in the fund to be used for administrative and personnel expenses before expenditure of the money. The commissioner shall order all other expenditures from the fund with the approval of the governor and the budget agency.

(c) Not more than four hundred fifty thousand dollars ($450,000) of the fund is available to the department each year to fund grants awarded under IC 13-20-20, exclusive of administrative and personnel expenditures authorized by section 1(a)(8) of this chapter.

As added by P.L.1-1996, SEC.15. Amended by P.L.237-1999, SEC.11.

IC 13-25-4-5
Corrective action determination; access to records

Sec. 5. (a) This section applies to the following:

(1) A person that stores, treats, or disposes of hazardous substances.

(2) If necessary to ascertain facts not available at the site or facility where the hazardous substances are located, a person that generates, transports, or otherwise handles or has handled hazardous substances.

(b) To assist in determining the need for corrective action under IC 13-22-13 or removal or remedial action under this chapter in connection with a

hazardous substance, a person described in subsection (a) shall:

(1) upon request of an officer, an employee, or a designated agent of the department, furnish information relating to the hazardous substances referred to in subsection (a)(1) or (a)(2); and

(2) permit the officer, the employee, or the designated agent of the department at any reasonable time to have access to and to copy all records relating to the hazardous substances referred to in subsection (a)(1) or (a)(2).

As added by P.L.1-1996, SEC.15.

IC 13-25-4-6
Entry for inspection by agent; reasonable promptness; samples

Sec. 6. (a) For the purpose of assisting in determining the need for corrective action under IC 13-22-13 or removal or remedial action in connection with a hazardous substance under this chapter, an officer, an employee, or a designated agent of the department may:

(1) enter at reasonable times any establishment or other place:

(A) where hazardous substances are or have been generated, stored, treated, or disposed of; or

(B) from which hazardous substances have been transported; and

(2) inspect and obtain samples of:

(A) any hazardous substance;

(B) containers or labeling for hazardous substances; or

(C) soil, surface water, ground water, or other environmental media.

(b) Each inspection under subsection (a)(2) must be commenced and completed with reasonable promptness. If the officer, the employee, or the representative of the department conducting the inspection obtains any samples, before leaving the premises the officer, the employee, or the representative shall give to the owner, the operator, or the person in charge of the premises:

(1) a receipt describing the sample obtained; and

(2) if requested, a portion or a duplicate of each sample equal in volume of weight to the portion retained.

(c) If an analysis is made of samples obtained in an inspection under subsection (a)(2), a copy of the results of the analysis shall be furnished promptly to the owner, the operator, or the person in charge of the premises inspected.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-7
Rules

Sec. 7. The solid waste management board shall adopt rules establishing criteria for determining the commissioner's priorities in selecting hazardous substance response sites. Until these rules have been adopted, the commissioner shall give priority to those sites presenting a significant threat to public health and environment.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-8
Liability of a person to the state; exceptions; presumptions concerning releases

Sec. 8. (a) Except as provided in subsection (b), (c), or (d), a person that is liable under Section 107(a) of CERCLA (42 U.S.C. 9607(a)) for:

(1) the costs of removal or remedial action incurred by the commissioner consistent with the national contingency plan;

(2) the costs of any health assessment or health effects study carried out by or on behalf of the commissioner under Section 104(i) of CERCLA (42 U.S.C. 9604(i)); or

(3) damages for:

(A) injury to;

(B) destruction of; or

(C) loss of;

natural resources of Indiana;

is liable, in the same manner and to the same extent, to the state under this section.

(b) The exceptions provided by Sections 107(b), 107(q), and 107(r) of CERCLA (42 U.S.C. 9607(b), 42 U.S.C. 9607(q), and 42 U.S.C. 9607(r)) to liability otherwise imposed by Section 107(a) of CERCLA (42 U.S.C. 9607(a)) are equally applicable to any liability otherwise imposed under subsection (a).

(c) Notwithstanding any liability imposed by the environmental management laws, a lender, a secured or unsecured creditor, or a fiduciary is not liable under the environmental management laws, in connection with the release or threatened release of a hazardous substance from a facility unless the lender, the fiduciary, or creditor has participated in the management of the hazardous substance at the facility.

(d) Notwithstanding any liability imposed by the environmental management laws, the liability of a fiduciary for a release or threatened release of a hazardous substance from a facility that is held by the fiduciary in its fiduciary capacity may be satisfied only from the assets held by the fiduciary in the same estate or trust as the facility that gives rise to the liability.

(e) Except as provided in subsection (g), a political subdivision (as defined in IC 36-1-2-13) or

unit of federal or state government is not liable to the state under this section for costs or damages associated with the presence of a hazardous substance on, in, or at a property in which the political subdivision or unit of federal or state government acquired an interest because of:

(1) bankruptcy;

(2) foreclosure;

(3) tax delinquency, including an acquisition under IC 6-1.1-24 or IC 6-1.1-25;

(4) abandonment;

(5) the exercise of eminent domain, including any purchase of property once an offer to purchase has been tendered under IC 32-24-1-5;

(6) receivership;

(7) transfer from another political subdivision or unit of federal or state government;

(8) acquiring an area needing redevelopment (as defined in IC 36-7-1-3) or conducting redevelopment activities, specifically under IC 36-7-14-22.2, IC 36-7-14-22.5, IC 36-7-15.1-15.1, IC 36-7-15.1-15.2, and IC 36-7-15.1-15.5;

(9) other circumstances in which the political subdivision or unit of federal or state government involuntarily acquired ownership or control because of the political subdivision's or unit's function as sovereign; or

(10) any other means to conduct remedial actions on a brownfield.

(f) If a transfer of an interest in property as described in subsection (e) occurs, a person who owned, operated, or otherwise controlled the property immediately before the political subdivision or unit of federal or state government acquired the interest in the property remains liable under this section:

(1) in the same manner; and

(2) to the same extent;

as the person was liable immediately before the person's interest in the property was acquired by the political subdivision or unit of federal or state government.

(g) Notwithstanding subsection (e), a political subdivision or unit of federal or state government that causes or contributes to the release or threatened release of a hazardous substance on, in, or at a property remains subject to this section:

(1) in the same manner; and

(2) to the same extent;

as a nongovernmental entity under this section.

(h) Except as provided in subsection (i), a nonprofit corporation is not liable to the state under this section for costs or damages associated with the presence of a hazardous substance on, in, or at a property in which the nonprofit corporation acquired

an interest to assist and support a political subdivision's revitalization and reuse of a brownfield for noncommercial purposes, including conservation, preservation, and recreation.

(i) Notwithstanding subsection (h), a nonprofit corporation that causes or contributes to a release or threatened release of a hazardous substance on, in, or at a property remains subject to this section:

(1) in the same manner; and

(2) to the same extent;

as any other nongovernmental entity under this section.

(j) A political subdivision or unit of federal or state government that establishes an exemption or defense under subsection (b) or (e) may undertake any activity related to:

(1) investigation, removal, or remedial action on a brownfield, including complying with land use restrictions and institutional controls; or

(2) monitoring or closure of an underground storage tank;

without being considered as contributing to the existing release or threatened release of hazardous substances on, in, or at the brownfield unless existing contamination on the brownfield is exacerbated due to gross negligence or intentional misconduct by the political subdivision or unit of federal or state government.

(k) For purposes of subsection (j), reckless, willful, or wanton misconduct constitutes gross negligence.

As added by P.L.1-1996, SEC.15. Amended by P.L.59-1997, SEC.15; P.L.90-1998, SEC.24; P.L.25-2005, SEC.3; P.L.208-2005, SEC.13; P.L.1-2006, SEC.205; P.L.221-2007, SEC.17.

IC 13-25-4-8.2
Lenders considered to participate in management

Sec. 8.2. A person that is a lender and that holds evidence of ownership primarily to protect a security interest in a vessel or facility may be considered to participate in the management (as defined in IC 13-11-2-151.4) of the hazardous substance at the facility only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person:

(1) exercises decision making control over the environmental compliance related to the vessel or facility such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or

(2) exercises control at a level comparable to that of a manager of the vessel or facility such that the person has assumed or manifested responsibility:

(A) for the overall management of the vessel or facility encompassing day to day decision making with respect to environmental compliance; or

(B) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance.

As added by P.L.90-1998, SEC.25.

IC 13-25-4-8.4
Limits on liability of fiduciaries

Sec. 8.4. (a) The liability of a fiduciary under this title for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

(b) Subsection (a) does not apply to the extent that a person is liable under this title independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

(c) Subsections (a) and (d) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

(d) A fiduciary is not liable in its personal capacity under this title for any of the following:

(1) Undertaking or directing another person to undertake a response action under 42 U.S.C. 9607(d)(1) or under the direction of an on-scene coordinator designated under the National Contingency Plan.

(2) Undertaking or directing another person to undertake other lawful means of addressing a hazardous substance in connection with the vessel or facility.

(3) Terminating the fiduciary relationship.

(4) Including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying, or enforcing the term or condition.

(5) Monitoring or undertaking at least one (1) inspection of the vessel or facility.

(6) Providing financial advice or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary.

(7) Restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship.

(8) Administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began.

(9) Declining to take any of the actions referred to in subdivisions (2) through (8).

(e) This section does not apply to a person if the person:

(1) acts in a capacity other than:

(A) a fiduciary capacity; or

(B) a beneficiary capacity;

and, in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(2) is a beneficiary and a fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits that exceed customary or reasonable compensation and incidental benefits permitted under other applicable law.

(f) This section does not preclude a claim against the assets of the estate or trust administered by:

(1) the fiduciary; or

(2) a nonemployee agent or independent contractor retained by a fiduciary.

(g) This section does not:

(1) affect the rights, immunities, or other defenses that are available under:

(A) this title; or

(B) other law that is applicable to a person subject to this chapter; or

(2) create:

(A) any liability for a person; or

(B) a private right of action against a fiduciary or any other person.

As added by P.L.90-1998, SEC.26.

IC 13-25-4-9
Court actions by commissioner; administrative orders

Sec. 9. (a) The commissioner may proceed in court, by appropriate action, to:

(1) compel a responsible person to undertake a removal or remedial action with respect to a release or threatened release of a hazardous substance from a facility or site in Indiana; or

(2) obtain an order to enter upon private or public property to carry out an appropriate response under the environmental management laws if the commissioner cannot identify or locate another person responsible for carrying out the response who:

(A) is willing to carry out the response and capable of doing so; or

(B) can be compelled to carry out the response under subdivision (1).

(b) The commissioner may issue an administrative order for the purpose set forth in subsection (a)(1).

As added by P.L.1-1996, SEC.15.

IC 13-25-4-10
Actions to recover costs and damages; punitive damages; deposit of recovery

Sec. 10. (a) The commissioner may proceed in the appropriate court to recover costs and damages for which a responsible person is liable to the state under any of the following:

(1) Section 107 of CERCLA (42 U.S.C. 9607).

(2) Section 8 of this chapter.

(3) This section.

(b) In addition to the recovery allowed under subsection (a) and the civil penalty provisions of IC 13-30-4-1 and IC 13-30-4-2, a person that:

(1) is liable for a release or threat of release of a hazardous substance; and

(2) fails, without sufficient cause, to properly provide removal or remedial action upon order of a court under section 9 of this chapter;

is liable for punitive damages.

(c) The commissioner may commence a civil action against a person described in subsection (b) to recover punitive damages. In the action, the commissioner may seek and the court may grant an award of punitive damages against a person described in subsection (b) for up to three hundred percent (300%) of the total costs incurred by the department as a result

of that person's failure to properly provide removal or remedial action upon the order of a court. However, any recovery in the action is subject to offset by the amount of any civil penalty paid by the person under IC 13-30-4-1 and IC 13-30-4-2 based upon the release, the threatened release, or the person's failure to properly provide removal or remedial action.

(d) Costs, damages, and punitive damages awarded under this section shall be deposited in the fund.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-11
Lien; amount

Sec. 11. After a response is initiated under:

(1) section 9 of this chapter; or

(2) IC 13-24-1;

the state may impose a lien on the property on which the response is undertaken. The lien may secure the payment to the state of an amount of money equal to the amount expended from the fund under section 1(a)(3) of this chapter to finance the response.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-12
Lien; perfection

Sec. 12. For a lien arising under section 11 of this chapter to be perfected, notice of the lien must be filed in the office of the county recorder of the county in which the real property subject to the lien is located. Before notice of a lien may be filed in the office of the county recorder, the department shall provide notice of the intention to file the lien as provided by section 19 of this chapter.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-13
Lien; notification of owner

Sec. 13. The department shall provide notice of the filing of a lien to the owner of the property if the owner can be identified. If the owner of record cannot be identified, the department shall notify the tenant or other person having control of the property.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-14
Lien; recording

Sec. 14. When a notice of a lien arising under section 11 of this chapter is presented to the county recorder for filing, the county recorder shall enter the lien appropriately in the entry book and in the

miscellaneous record. The entries made under this section must show the following:

(1) The date of filing.

(2) The book and page number or instrument number.

(3) The name of the person named in the notice.

(4) A legal description of the property if appropriate.

(5) A serial number or other identifying number given in the notice.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-15
Lien; discharge; release

Sec. 15. (a) Subject to subsection (b), when a certificate of discharge of a lien arising under section 11 of this chapter or IC 13-7-8.7-10.7 (before its repeal) is:

(1) issued by an employee or a designated agent of the department; and

(2) presented for filing in the office of the county recorder of the county where the notice of lien was filed;

the county recorder shall record the certificate of discharge as a release of the lien.

(b) To be recorded under this section, the certificate must refer to the county recorder's book and page number or instrument number under which the lien was recorded.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-16
Lien; release; recording

Sec. 16. When recording a release of a lien under section 15 of this chapter, the county recorder shall inscribe, in the margin of each entry made to record the lien under section 14 of this chapter, a reference to the place where the release is recorded.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-17
Lien; discharge and satisfaction

Sec. 17. Upon:

(1) the recording of the certificate of discharge as a release under section 15 of this chapter; and

(2) the inscribing of the references to the release under section 16 of this chapter; a certificate of discharge of a lien arising under section 11 of this chapter operates as a full discharge and satisfaction of the lien unless the references to the release

inscribed under section 15 of this chapter specifically note the release as a partial lien release.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-18
Lien; duration

Sec. 18. A lien created under section 11 of this chapter or IC 13-7-8.7-10.7 (before its repeal) continues until the earlier of the following:

(1) The full discharge and satisfaction of the lien.

(2) The expiration of a ten (10) year period from the date of the creation of the lien unless an action to foreclose the lien is pending.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-19
Notice of intent to impose lien

Sec. 19. (a) At least thirty (30) days before notice of a lien arising under this chapter may be filed under section 12 of this chapter, the department must send a written notice:

(1) to the owner of the real property that would be subject to the lien; or

(2) if the owner of record cannot be identified, to the tenant or other person having control of the real property;

of the date on which the state intends to impose a lien under section 11 of this chapter.

(b) The department shall provide the county recorder of the county in which the real property that would be subject to the lien is located with a copy of the written notice described in subsection (a).

As added by P.L.1-1996, SEC.15.

IC 13-25-4-20
Request for and conduct of hearing

Sec. 20. (a) Before the date on which the state intends to impose a lien on real property under section 11 of this chapter, the owner of the real property may request that a hearing be conducted under IC 4-21.5. A hearing conducted under this section and IC 4-21.5 shall be limited to determining if there is probable cause to believe that:

(1) a removal or a remedial action was conducted on the real property under:

(A) this chapter; or

(B) IC 13-24-1; and

(2) if the removal or the remedial action was conducted under this chapter, the owner of the real property would be subject to liability under 42

U.S.C. 9607 (Section 107 of the federal Comprehensive Environmental Response, Compensation, and Liability Act).

(b) For the purposes of a hearing conducted under this section and IC 4-21.5, an environmental law judge is the ultimate authority.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-21
Effect of request for hearing

Sec. 21. If an owner requests a hearing under section 20 of this chapter, the state may not impose a lien on the owner's real property under section 11 of this chapter until the commissioner determines after the hearing that there is probable cause to believe that:

(1) a removal or a remedial action was conducted on the real property under this chapter or IC 13-24-1; and

(2) if the removal or the remedial action was conducted under this chapter, the owner of the real property would be subject to liability under 42 U.S.C. 9607 (Section 107 of the federal Comprehensive Environmental Response, Compensation, and Liability Act).

As added by P.L.1-1996, SEC.15.

IC 13-25-4-22
Retrieval of copy of written notice from county recorder

Sec. 22. If the department provides a county recorder with a copy of a written notice under section 19(b) of this chapter, the department shall retrieve the copy of the written notice from the county recorder on the date a lien is imposed on the real property described in the written notice. However:

(1) if:

(A) a hearing is not held under section 20 of this chapter and IC 4-21.5; and

(B) a lien is not imposed:

(i) on the real property described in the notice; and

(ii) by the date indicated in the notice;

the department shall retrieve the copy of the notice on the day after the date the lien was to be imposed on the real property; or

(2) if:

(A) a hearing is held under section 20 of this chapter and IC 4-21.5; and

(B) a lien is not imposed on the real property described in the notice;

the department shall retrieve the copy of the notice on the day after the date the commissioner determines that a lien may not be imposed on the real property.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-23
Agreements for removal and remedial action

Sec. 23. (a) The commissioner may enter into an agreement with one (1) or more potentially responsible persons concerning removal and remedial action at a site in Indiana. An agreement entered into under this section may call for one (1) or more parties, at the party's own expense, to conduct any response action at a site if the commissioner determines that the action called for in the agreement will be performed properly.

(b) An agreement entered into under this section may provide that the commissioner will:

(1) reimburse one (1) or more parties for certain costs of the actions that those parties have agreed to perform under the agreement; or

(2) perform a part of the response action called for in the agreement. Money from the fund may be used for the reimbursement. An agreement may provide for the commissioner to pay interest on the principal amount to be reimbursed. Money from the fund may be used to pay the interest.

(c) The commissioner may not enter into an agreement subject to subsection (b) if, in the commissioner's opinion, there is not a reasonable likelihood of recovering:

(1) the amount of the reimbursement agreed to under subsection (b); and

(2) other costs incurred by the department in the response action; unless the commissioner determines that the agreement is nonetheless in the public interest.

(d) After entering into an agreement that provides for reimbursement under subsection (b), the commissioner shall make every reasonable effort to recover the amount of the reimbursement under section 10 of this chapter from persons other than the parties.

(e) An agreement entered into under this section may be established:

(1) in an administrative order issued by the commissioner; or

(2) by a consent decree entered in an appropriate court.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-24
Contaminated property; restrictive covenants

Sec. 24. (a) This section applies to real property that is:

(1) the site of an existing or former hazardous waste facility that is or was subject to regulation under:

(A) IC 13-22-2 through IC 13-22-8 and IC 13-22-13 through IC 13-22-14; or

(B) Subchapter III of the federal Solid Waste Disposal Act (42 U.S.C. 6921 through 6939e); or

(2) a site:

(A) on which a hazardous substance has been:

(i) deposited;

(ii) stored; or

(iii) disposed of; and

(B) that is or was listed on the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) in accordance with Section 116 of CERCLA (42 U.S.C. 9616);

if more than an insignificantly small amount of a hazardous substance remains on or beneath the surface of that property after the partial or final closure of a hazardous waste facility located on the property

or the completion of a remedial action on the property under

CERCLA or this chapter.

(b) The owner of real property described in subsection (a) shall execute and record, in the office of the county recorder of the county in which the property is located, a restrictive covenant applying to the property if the commissioner determines that a restrictive covenant meeting the requirements set forth in subsection (c) is necessary to protect the public health or welfare or the environment from unreasonable risk of future exposure to a hazardous substance.

(c) A restrictive covenant required under this section must:

(1) to the extent feasible, describe:

(A) the identity, quantity, and location of every hazardous substance:

(i) deposited;

(ii) stored;

(iii) disposed of; or

(iv) placed;

on the property; and

(B) the extent to which each hazardous substance remains on the property; and

(2) incorporate the conditions and restrictions that the commissioner considers necessary to assure that the future use of the property will not disturb the final cover, any liners, or any components of the hazardous substance containment system on the property, or disturb the function of the monitoring system on the property, unless the commissioner finds that the disturbance:

(A) is necessary to the proposed use of the property and will not increase the potential hazards to human health or to the environment; or

(B) is necessary to mitigate a threat to human health or to the environment.

(d) If a change of conditions or advancements in science or technology permit an alteration in the conditions and restrictions imposed by a restrictive covenant required by this section that would not increase the potential hazards to human health or to the environment, the commissioner, upon written request by the owner of the real property, may authorize the filing of a supplemental recording recognizing a change in the restrictive covenant in the office of the county recorder to reflect the change in the conditions and restrictions.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-25
Annual report on remedial actions

Sec. 25. Before January 1 of each year, the commissioner shall make a report concerning the progress of remedial actions commenced under this chapter to the following:

(1) The governor.

(2) The standing committees of the house of representatives and the senate concerned with the environment.

(3) The board.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-26
Removal or remedial actions; state or local permit

Sec. 26. A state or local permit may not be required for the part of a removal or remedial action that is conducted entirely at the site of the release or threatened release of a hazardous substance if the removal or remedial action is selected and carried out in compliance with:

(1) this chapter; and

(2) IC 13-25-5.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-27
Action or claims; effect of chapter; immunity for liability for claims or contributions

Sec. 27. (a) This chapter does not affect an action or a claim, including a claim for contribution, that a person who implements or completes an approved response action has or may have against a third party.

(b) A person who implements or completes an approved response action under this chapter may not be held liable for claims or contribution concerning matters addressed in the response action.

As added by P.L.1-1996, SEC.15.

IC 13-25-4-28
Criminal penalty for application misstatement

Sec. 28. A person who, with intent to defraud, knowingly or intentionally makes a material misstatement in connection with an application for financial assistance from the fund commits a Class D felony.

As added by P.L.137-2007, SEC.29.

IC 34-13

ARTICLE 13. CAUSES OF ACTION: CLAIMS AGAINST THE GOVERNMENT

IC 34-13-1
Chapter 1. Contract Claims Against the State

IC 34-13-1-1
Commencement of actions; limitations; trial by court

Sec. 1. (a) Any person having a claim against the state arising out of an express or implied contract may bring suit within ten (10) years after accrual of the claim.

(b) The claim brought under this section shall be tried to the court, not a jury.

As added by P.L.1-1998, SEC.8.

INDIANA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:	)
SHELLY DITCH Crawfordsville, Montgomery County, Indiana	)
Raybestos Company Respondent	)
Proceeding under the Environmental Management Act (Indiana Code 13)	)

AGREED ORDER FOR REMOVAL

Feb. 25, 1997

I. INTRODUCTION

The Indiana Department of Environmental Management (IDEM), by its Commissioner, having determined that a release of a hazardous substance has occurred or that the threat of a release of a hazardous substance is present and the parties hereto being desirous of entering into this Agreed Order (Order) for the purpose of carrying out a Removal with respect to such release or threat of release and without the need for resort to litigation, now agree to the following terms and conditions pursuant to Indiana Code (IC) 13-25-4.

II. JURISDICTION

1. This Order is entered into by and between the IDEM, by its Commissioner, and Respondent pursuant to IC 13-25-4-23.

2. The Respondent agrees to undertake the actions required by the terms and conditions of this Order and to waive its right to administrative review of this Order and agrees not to contest the jurisdiction of IDEM to enter into this Order. However, the Respondent reserves all rights they may have under common law, the Indiana Code and federal statutes to seek contribution or indemnity from others not signatories to this Order.

3. In agreeing to the issuance of and entering into this Order, the Respondent neither admits nor denies liability.

III. NOTICE OF ACTION

4. The Commissioner hereby determines that the action called for in this Order shall be performed properly by the Respondent.

5. IDEM has notified the Indiana and the Federal Natural Resources Trustee by letter dated October 25, 1996 of this Order.

IV. PARTIES BOUND

6. This Order shall apply to and be binding upon the Respondent, its officers, directors, principals,

employees, agents, successors, subsidiaries, legal representatives and assigns and upon IDEM. The signatories to this Order certify that they are fully authorized to execute and legally bind the parties they represent. No change in ownership, corporate, or partnership status of the Respondent shall in any way alter its status or responsibilities under this Order.

7. The Respondent shall provide a copy of this Order, if in force, to any subsequent owners or successors before ownership rights are transferred. The Respondent shall provide a copy of this Order to all contractors, sub-contractors, laboratories, and consultants which are retained to conduct any work performed under this Order, within fourteen (14) days after the effective date of this Order or the date of retaining their services. The Respondent shall by contract require that all contractors, firms, and other persons acting for it comply with the terms of this Order.

V. DEFINITIONS

8. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. Section 9601, et seq.

9. "Day" or "calendar day" shall be defined as the 24-hour period between 12:00 A.M.-12:00 A.M.

10. "Facility" shall be used in the manner as defined by Section 101(9) of CERCLA, 42 U.S.C. Section 9601(9), where treatment, storage or disposal of hazardous substances, was conducted; the subject Facility is located in Crawfordsville, Montgomery County, Indiana, commonly known as Shelly Ditch, and includes its drainage basin. The Facility does not include the manufacturing and process buildings of the Raybestos Products Company.

11. "NCP" means the National Oil and Hazardous Substance Pollution Contingency Plan, 40 CFR Part 300, as amended.

12. "Shelly Ditch Drainage Basin" is defined as the area from which Shelly Ditch receives stormwater or surface water including from overland flow and subsurface stormwater conveyances.

VI. STATEMENT OF PURPOSE

13. In entering into this Order, the mutual objectives of IDEM and Respondent are: (a) a removal of released hazardous substances from the environment; (b) the disposal of the removed material; and, (c) any actions necessary to monitor, assess and evaluate the continuing effectiveness of the above response actions.

14. The activities conducted by the Respondent under this Order are subject to approval by IDEM. The Respondent shall provide all necessary information for a removal for the facility. The activities conducted

by the Respondent shall be consistent with the requirements of the NCP, U.S. EPA guidance documents, and all applicable laws. Respondent shall employ sound scientific, engineering and construction practices.

VII. FINDINGS OF FACT

Based upon information available on the effective date of this Order, the Commissioner of IDEM makes the following findings of fact:

15. Shelly Ditch is a County drainage ditch that is part of the storm water drainage system that manages storm water run-off from the northeast sector of the town of Crawfordsville, Montgomery County, Indiana. The Site lies in the center of Section 32, Township 19 North, Range 4 West. Shelly Ditch is approximately 5,000 feet in length and essentially begins by the east edge of a railroad spur which is believed to be connected to the Louisville and Nashville Railroad tracks. Shelly Ditch runs through a residential area of approximately 17 houses.

16. The water in Shelly Ditch flows westward and empties into Sugar Creek. A Group Five Fish Advisory is posted for Sugar Creek. The Group Five fish advisory indicates that no one should consume small mouth bass over 7 inches or rock bass over 4 inches from Sugar Creek. The fish advisory has been issued as polychlorinated byphyenals (PCBs) have been identified in the fish collected from Sugar Creek.

17. IDEM collected sediment and soil samples upgradient of three culverts along the western edge of Raybestos property, downgradient of the three culverts, in the low lying areas along Shelly Ditch and in residential properties. The analysis of the sediment samples obtained downgradient of the three culverts located along the western edge of the Raybestos property indicated elevated levels of PCBs and lead. No significant levels of PCBs or lead were detected in samples collected upgradient of the Raybestos property. Soil samples were collected by IDEM from those areas of residential property subject to flooding and elevated levels of PCBs and lead were detected in these soil samples.

18. The site of the Raybestos Products Company was developed in 1951 by Raybestos of Manhattan, Inc. as a manufacturing facility for friction products for the automotive industry. From 1982 through October 30, 1987, this facility was owned and operated by Ray Mark Industries, Inc. Beginning in November, 1987, the facility has continually been owned and operated by Raybestos Products Company. The Raybestos Product Company is a former interim status storage facility that has undergone closure as required by the Resource Conservation and Recovery Act (42 U.S.C. 6900 et seq.).

19. Raybestos of Manhattan, Inc. purchased Pydraul F-9 from Monsanto in 1967. The hydraulic oil contained PCBs as an ingredient. Raybestos Products Company reported a spill of transformer oil containing

PCBs on June 11, 1990 and subsequently reported that the spill had been mitigated.

VIII. CONCLUSIONS OF LAW

Based upon the information available on the effective date of this Order, the Commissioner of IDEM makes the following conclusions of law.

20. Shelly Ditch and its drainage basin, excluding the manufacturing and processing buildings of Raybestos, comprise the boundaries of the "facility" as defined in 42 U.S.C. 9601(9).

21. Pollutants, contaminants or constituents thereof at the facility are "hazardous substances" as defined in IC 13-11-2-98.

22. The Respondent is a "person" as defined by IC 13-11-2-158.

23. The Respondent is a "responsible person" as defined by IC 13-11-2-192.

24. The past, present, or potential migration of hazardous substances from the site constitutes a "release" as defined in IC 13-11-2-184.

25. IDEM has incurred, and will continue to incur, costs due to the undertaking of "response" actions as defined by IC 13-11-2-189.

26. A removal is a response action pursuant to IC 13-11-2-189.

IX. WORK TO BE PERFORMED

27. All work to be performed by the Respondent pursuant to this Order shall be under the direction and supervision of a Certified Professional Engineer or Certified Professional Geologist with expertise in hazardous waste site investigation. Prior to the initiation of site work, the Respondent shall notify IDEM, in writing, regarding the name, title, and qualification of such engineer or geologist and of any contractors and/or subcontractors to be used in carrying out the terms of this Order. Selection of any such engineer or geologist or contractor and/or subcontractor shall be subject to approval by IDEM. The Respondent shall notify IDEM prior to disposal of any material of the name and location of the proposed disposal facility. The Respondents shall comply with both State and Federal requirements in its treatment, storage and disposal of waste generated by its removal activities at the Facility.

28. Exhibit A to this Order provides a Statement of Work (SOW) for implementation of the removal, which is incorporated into and made a part of this Order.

29. Within fifteen (15) calendar days of the effective date of this Order, the Respondent shall submit a work plan to IDEM for the removal activities. The Removal Work Plan shall be developed in accordance with the attached SOW, Section 121 of CERCLA, the U.S. EPA guidance on removals, and any guidance documents provided by IDEM.

30. The Removal Work Plan submittal shall include, but not be limited to, the following project plans: (1) a quality assurance project plan; (2) a sampling and analysis plan; (3) a health and safety plan; (4) a schedule for implementation of all tasks set forth in the Work Plan; and (5) data management plan.

31. Within fifty (50) calendar days of the approval date of the Work Plan, the Respondent shall submit a Technical Memorandum. The Technical Memorandum shall be developed in accordance with the attached SOW, Section 121 of CERCLA, the U.S. EPA guidance on removals, and any guidance documents provided by IDEM.

32. The Removal Work Plan and Technical Memorandum shall be subject to review, modification, and approval by IDEM.

33. IDEM shall notify the Respondent, in writing, of IDEM approval or disapproval of the Work Plan or Technical Memorandum or any part thereof. The IDEM Project Manager shall notify the Respondent, in writing, of any deficiencies in said Work Plan or Technical Memorandum.

34. Within fifteen (15) calendar days of receipt of any IDEM Work Plan or Technical Memorandum disapproval, the Respondent shall submit a revised Work Plan or Technical Memorandum to IDEM that addresses the deficiencies outlined by IDEM. In the event of subsequent IDEM disapproval of the Work Plan or Technical Memorandum, IDEM retains the

right to complete the Work Plan or Technical Memorandum and conduct the work and seek cost recovery, or enforce the terms of this Order, which shall include said Work Plan or Technical Memorandum.

35. The Respondent shall initiate the work detailed in the Work Plan or Technical Memorandum within fifteen (15) calendar days of the Work Plan or Technical Memorandum being fully approved by IDEM and complete the work according to the approved schedule in the Work Plan or Technical Memorandum. The fully approved Work Plan or Technical Memorandum shall be deemed incorporated into and made an enforceable part of this Agreed Order.

X. MEETINGS AND REPORTS

36. The Respondent shall provide a preliminary and final Removal Completion Report and any other reports required by the Removal Work Plan to IDEM in accordance with the schedule contained therein. The Respondent shall submit five (5) copies of all said reports.

37. IDEM shall review and approve or disapprove the preliminary and final Removal Completion Report and any other preliminary or final reports specified in the Removal Work Plan within thirty (30) days of receipt. If IDEM disapproves any such preliminary or final reports, it shall specify, in writing, any deficiencies or modifications. The Respondent shall, within fifteen (15) calendar days, in writing,

submit a revised report to IDEM which incorporates the required modifications or additions.

38. In the event of further disapproval of any revised report, stipulated penalties under Section XIX may accrue until such time as IDEM has determined that the specified deficiencies have been cured.

39. The Respondent shall participate in monthly meetings (which may be conference calls) and shall provide written documentation in the form of monthly progress reports to IDEM. At a minimum this documentation shall: (1) describe the actions which have been taken toward achieving compliance with this Order; (2) include all results of sampling and tests and all other data, including raw data (this should be submitted by separate envelope), received by the Respondent during such period; (3) include all plans and procedures completed during the past period as well as such actions, data, and plans which are scheduled for the next period; (4) discuss any problems encountered and their resolution; (5) identify changes in key personnel; and, (6) list target and actual completion dates for each element of activity, including the project completion, and provide an explanation of any deviation from the schedule in the Work Plan.

40. The monthly progress report shall be submitted to IDEM by the tenth (10th) calendar day of each month. Any revisions to this documentation required by IDEM's Project Manager shall be submitted within thirty (30) calendar days, or such

shorter period (but not less than five (5) calendar days) as the IDEM Project Manager may establish.

XI. ADDRESSES FOR ALL CORRESPONDENCE

41. Documents, including reports, approvals, notifications, disapprovals, and other correspondence, to be submitted under this Order, shall be sent by certified mail, return receipt requested, or other courier services which provide return receipts, to the following addresses or to such addresses as the Respondent or IDEM may designate in writing.

Documents to be submitted to IDEM should be sent to:

Ms. Holly Grejda
Project Manager
Office of Environmental Response
100 North Senate Avenue
P.O. Box 6015
Indianapolis, Indiana 46204-6015
(317) 308-3116

Documents to be submitted to the Respondent should be sent to:

Mr Tim Dibble
Raybestos Products Company
1204 Darlington Avenue
Crawfordsville, Indiana 47933
(317) 362-3500 Ext. 261

XII. COMPLIANCE WITH APPLICABLE LAWS

42. All work undertaken by the Respondent pursuant to this Order shall be performed in compliance with all applicable Federal, state and local laws, ordinances and regulations, including all Occupational Health and Safety Administration and Department of Transportation regulations. In the event of a conflict in the application of Federal, state, or local laws, ordinances and regulations, the Respondent shall comply with the most stringent of said laws, ordinances, or regulations, unless provided otherwise in writing by IDEM. The Respondent shall be responsible for obtaining all Federal, state or local permits which are necessary for the performance of any work hereunder. A state or local permit may not be required for the part of a removal or remedial action that is conducted entirely at the site of the release or threatened release of a hazardous substance if the removal or remedial action is selected and carried out in compliance with IC 13-25-4.

XIII. DESIGNATED PROJECT MANAGER

43. On or before the effective date of this Order, IDEM and the Respondent shall each designate a Project Manager. Each Project Manager shall be responsible for overseeing the implementation of this Order. The IDEM Project Manager will be the IDEM designated representative at the site. To the maximum extent possible, communications between the Respondent and IDEM and all documents (including

reports, approvals, and other correspondence) concerning the activities performed pursuant to the terms and conditions of this Order shall be directed through the Project Managers. During implementation of this Order, the Project Managers shall, whenever possible, operate by consensus and shall attempt in good faith to resolve disputes informally through discussion of the issues. Each party has the right to change its respective Project Manager by notifying the other party in writing at least five (5) calendar days prior to the change.

44. The IDEM Project Manager shall have the authority vested in an On-Scene Coordinator (OSC) and a Remedial Project Manager, as described by the NCP, including the authority to halt, conduct, or direct any work required by this Order an[sic]/or any response actions or portions thereof when conditions may present an imminent and substantial endangerment to public health or welfare or the environment. In the event that the IDEM Project Manager halts work pursuant to this paragraph, the schedule of work described in the Work Plan and this Order shall be modified accordingly and shall be subject to the approval of IDEM.

45. The absence of the Respondent's or IDEM's Project Manager from the facility shall not be cause for the stoppage of work. The Respondent's Project Manager or his supervisor shall be available by telephone while the field investigation is being performed. The Respondent's consultant shall designate

a person to be in charge who will be available on-site when field work is being performed.

XIV. QUALITY ASSURANCE

46. The Respondent shall use quality assurance, quality control, and chain of custody procedures in accordance with the Indiana Quality Assurance Project Plan, which has been approved by the U.S. EPA, throughout sample collection and analysis activities under this Order, unless IDEM agrees otherwise.

47. Respondent shall consult with the IDEM Project Manager in planning for, and prior to, all sampling and analysis as detailed in the Work Plan. To provide quality assurance and maintain quality control, the Respondent shall include, but not be limited to the following activities:

(a) ensure that IDEM personnel and/or IDEM authorized representatives are allowed access to laboratories and personnel utilized by the Respondent for analyses;

(b) ensure that all sampling and analyses are performed according to U.S. EPA methods, Indiana Quality Assurance Project Plan, or other methods deemed satisfactory by IDEM; and,

(c) ensure that any laboratories used by the Respondent for analyses participate in a documented Quality Assurance/Quality Control program that complies with U.S. EPA guidance documents. As part of such a program,

and upon request by IDEM, such laboratories shall perform analyses of samples provided by IDEM to demonstrate the quality of analytical data for each such laboratory.

48. In the event laboratory fails to perform the activities required above, IDEM reserves the right to reject any data not gathered pursuant to the requirements listed above, and to require that the Respondent utilize a different laboratory.

XV. SAMPLING AND DATA/ DOCUMENT AVAILABILITY

49. The Respondent shall make the results of all sampling, including raw data, and/or tests or other data generated by the Respondent, or on the Respondent's behalf, with respect to this Order, available to IDEM, and shall submit these results in the monthly progress report as described in Section X of this Order. IDEM will make available to the Respondent the quality assured results of sampling and/or tests or other data similarly generated by IDEM.

50. At the request of IDEM, the Respondent shall provide split or duplicate samples to IDEM and/or its authorized representative, of any samples collected by the Respondent pursuant to the implementation of this Order. At the request of the Respondent, IDEM or its authorized representative, shall, provide split or duplicate samples to the Respondent of any samples collected by IDEM and/or its authorized representative pursuant to the implementation

of this Order. Each party shall notify the other in advance of any sample collection activity.

XVI. ACCESS

51. To the extent that the site or other areas where work is to be performed hereunder is presently owned or controlled by parties other than those bound by this Order, the Respondent shall obtain, or shall use its best efforts to obtain an access agreement from the present owner. Said agreement/agreements shall provide access for and authorized representatives of IDEM, as specified below. In the event that said access agreements are not obtained, the Respondent shall so notify IDEM, which may then, at its discretion, assist the Respondent in gaining access. IDEM reserves the right to terminate or modify, as necessary, this Order, should the Respondent's inability to gain access to the site or other areas materially affect the Respondent's ability to perform the work required herein.

52. The Respondent shall provide authorized representatives of IDEM access to the site and other areas where work is to be performed at all reasonable times. Such access shall be for purposes including, but not limited to: inspecting records, operating logs and contract related to the site; reviewing the progress of the Respondent in carrying out the terms of this Order; conducting such tests, inspections, and sampling as IDEM may deem necessary; using a camera, sound recording, or other documentary type

equipment for field activities; and, verifying the data submitted to IDEM by the Respondent hereunder. The Respondent shall permit IDEM's authorized representatives to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, which pertain to this Order and over which the Respondent exercises control. All persons with access to the site pursuant to this Order shall comply with the approved Health and Safety Plan.

53. Nothing herein shall be construed as restricting the inspection or access authority of IDEM under any law or regulation.

XVII. RECORD PRESERVATION

54. The Respondent agrees to preserve, during the pendency of this Order and for a minimum of six (6) years after its termination, all records and documents in the Respondent's possession or in the possession of its employees, agents, accountants, contractors, or attorneys which relate in any way to the subject matters covered by this Order. Upon request by IDEM, the Respondent shall make available to IDEM said records, or copies of any said records. After this six year period, the Respondent shall notify IDEM in writing thirty (30) calendar days prior to the destruction of any such records. At that time, if IDEM requests that some or all of said records be preserved for a longer period of time, the Respondent shall

provide IDEM with the records that IDEM wishes to preserve.

XVIII. DISPUTE RESOLUTION

55. This section (Dispute Resolution) shall apply to any dispute arising under any section of this Order, unless specifically excepted.

56. The parties shall use their best efforts to, in good faith, resolve disputes or differences of opinion informally. If, however, disputes arise concerning this Order which the parties are unable to resolve informally, the Respondent may present written notice of such dispute to IDEM and set forth specific points of dispute and the position of the Respondent. This written notice shall be submitted no later than five (5) calendar days after the Respondent discovers the Project Managers are unable to resolve the dispute. The Respondent's Project Manager will notify IDEM's Project Manager immediately by phone or other appropriate methods of communication, prior to written notice, when he believes the parties are unable to resolve a dispute.

57. Within ten (10) calendar days of receipt of a written notice of dispute, IDEM shall provide a written response to the Respondent setting forth its position and the basis therefor. During the next five (5) business days following the Respondent's receipt of the response, the parties shall attempt to negotiate in good faith a resolution of their differences.

58. Following the expiration of the time periods described in the immediately preceding paragraph, if IDEM concurs with the position of the Respondent, the Respondent shall be notified in writing and this Order shall be modified to include any necessary extensions of time or variances of work. If IDEM does not concur with the position of the Respondent, IDEM, through the Commissioner or his designate, shall resolve the dispute, based upon and consistent with the terms of this Order, and shall provide written notification of such resolution to the Respondent. Should Respondent's failure to comply with IDEM's decision result in IDEM's initiation of administrative or judicial action, the Respondent retains all rights under the Indiana Administrative Orders and Procedures Act and all other applicable statutes and rules.

59. The pendency of dispute resolution set forth in this section shall not affect the time period for completion of work and/or obligations to be performed pursuant to this Order, except that, upon mutual agreement of IDEM and the Respondent, any time period may be extended, not to exceed the actual time taken to resolve the dispute. Elements of work and/or obligations not affected by the dispute shall be completed in accordance with the schedule contained in the Work Plans.

60. Elements of work and any actions required as a result of such dispute resolution shall immediately be incorporated, if necessary, into the appropriate plan or procedure, and into this Order. The

Respondent shall proceed with all remaining work according to the modified plan or procedure.

61. In any administrative or judicial proceeding initiated by IDEM concerning this Order, the party or parties disputing IDEM's position shall have the burden of proving that IDEM's position is arbitrary and capricious, inconsistent with this Order, or is not consistent with the NCP.

62. Stipulated penalties do not accrue during dispute resolution as to a matter which is the subject of the dispute.

XIX. STIPULATED PENALTIES

63. Respondent shall be liable for payment to IDEM of the sums set forth below as stipulated civil penalties for each day, or part thereof, that the Respondent fails to submit a report to document or comply with a schedule in accordance with the requirements contained in this Order, unless IDEM determines that such delay (1) is attributable to a force majeure as defined in Section XX below, or (2) is permitted by an extension of time granted by IDEM. Unless deferred by IDEM, such sums shall be due and payable within thirty (30) calendar days of receipt of notification from IDEM assessing the stipulated civil penalties.

64. All checks shall be made payable to the Hazardous Substances Response Trust Fund and mailed along with a transmittal letter stating the site

name and number to the Indiana Department of Environmental Management, Attention Cashier, 100 North Senate Avenue, P.O. 7060, Indianapolis, Indiana 46206-7060. A copy of the check and transmittal letter shall be mailed to IDEM Project Manager as well.

65. The stipulated penalties are as follows:

(a) Late monthly progress reports: for each day that the Respondent fails to submit monthly progress reports in accordance with Section X of this Order, $50 per day for the first seven days; $150 per day for the eight through the thirtieth day; and $250 per day after the thirtieth.

(b) Late Draft or Final of any of the following: Work Plans for the Removal, Technical Memorandum, Phased or Final reports: for each day that the Respondent fails to submit these reports in accordance with Section IX and X of this Order, $750 per day for the first seven days; $1000 per day for the eighth through the thirtieth day; and $2500 per day after the thirtieth day.

(c) Failure to comply with any schedule contained in any approved Work Plan or Technical Memorandum: for each day that the Respondent fails to implement the required work on schedule, $1000 per day for the first seven days; $2000 per day for the eight through the thirtieth day; and $5000 per day after the thirtieth day.

(d) Failure to pay past and future response costs as provided for in Section XXII, paragraph 80: for each day that the Respondent fails to pay said costs, $100 per day for the first seven days; $200 per day for the eighth through the thirtieth day; and $500 per day after the thirtieth day.

XX. FORCE MAJEURE

66. The Respondent shall cause all work or required reporting to be performed within the time limits set forth herein, unless performance is delayed by events which constitute a force majeure. For purposes of this Order, a force majeure is an event arising from circumstances beyond the reasonable control of the Respondent, and includes those precipitation or flowing water events that would interrupt the designed removal activities and which delays performance of any obligations required by this Order. Increases of costs shall not be considered an event of force majeure.

67. The Respondent shall notify IDEM by calling within three (3) calendar days and by writing no later than seven (7) calendar days after any event which the Respondent contend is a force majeure. Such notification shall describe the anticipated length of the delay, the cause or causes of the delay, the measures taken or to be taken by the Respondent to minimize the delay, and the timetable by which these measures will be implemented. The Respondent shall have the burden of demonstrating that the event is a

force majeure. The decision shall be made by the Assistant Commissioner, or designate, of the Office of Environmental Response. Said decision shall be immediately communicated to Respondent.

68. If a delay is attributable to a force majeure, the time period for performance under this Order shall be extended, in writing, by the amount of time that is attributable to the event constituting the force majeure.

XXI. RESERVATION OF RIGHTS

69. IDEM and Respondent reserve all rights and defenses they may have pursuant to any available legal authority unless expressly waived herein.

70. Nothing herein is intended to release, discharge, or in any way affect any claims, causes of action or demand in law or equity which the parties may have against any person, firm, partnership or corporation, not a party to this Order for any liability it may have arising out of, or relating in any way to, the generation, storage, treatment, handling, transportation, release or disposal of any materials, hazardous substances, hazardous waste, contaminants, or pollutants at, to, or from the Facility. The parties to this Order expressly reserve all rights, claims, demands, and causes of action they have against any and all other persons and entities who are not parties to this Order, and as to each other for matters not covered hereby.

71. IDEM recognizes that the Respondent may have the right to seek contribution, indemnity, or any other available remedy against any person found to be responsible or liable for contributions, indemnity, or otherwise for any amounts which have been or will be expended by the Respondent in connection with the Facility.

XXII. ADMINISTRATIVE COSTS

72. Respondent agrees to pay to IDEM its past and future oversight costs. Within sixty (60) days of IDEM approval of the final Removal Completion Report, IDEM shall send the Respondent an accounting of its response costs. Within thirty (30) calendar days of the effective date of the Order, the Respondent shall pay said amount of past costs incurred by the State. Failure to pay said response costs in a timely fashion, as provided above, shall subject Respondent to the payment of the stipulated penalties contained in Section XIX, paragraph 65, subparagraph d.

73. Checks should be made payable to the Hazardous Substances Response Trust Fund and be mailed along with a transmittal letter stating the site name and address to the Indiana Department of Environmental Management; Attention: Cashier; 100 North Senate Avenue; P.O. Box 7060; Indianapolis, Indiana 46206-7060. In addition, a copy of the check and transmittal letter shall be mailed to the IDEM Project Manager.

74. Response costs shall include all reasonable and appropriate direct and indirect costs of IDEM's oversight arrangement for this Order including, but not limited to, time and travel costs of IDEM personnel and associated indirect costs, contractor costs, compliance monitoring, including the collection and analysis of split or duplicate samples, inspection of Respondent's activities, site visits, interpretation and enforcement of provisions of this Order, discussions regarding disputes that may arise as a result of this Order, review and approval or disapproval of reports and the costs of redoing any of the Respondent's tasks required by this Agreed Order. Such costs shall also include the costs incurred by IDEM in having a qualified person oversee the conduct of the Respondent under this Order.

XXIII. COMMUNITY RELATIONS

75. The Respondent will cooperate with IDEM in providing information about the Removal to the public. IDEM will give the Respondent notice of and may require the Respondent's or its agent's attendance at such public meetings it may hold or sponsor.

76. A site information file shall be maintained by IDEM at a repository near the site. Respondent shall be notified of the location of said repository.

XXIV. INDEMNIFICATION

77. The Respondent agrees to indemnify and save and hold the State of Indiana, its agencies, departments, agents, and employees, harmless from any and all claims or causes of action arising from, or on account of, acts or omissions of the Respondent, its officers, employees, receivers, trustees, agents, or assigns, in carrying out the activities pursuant to this Order.

XXV. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

78. The effective date of this Order shall be the date on which this Order is signed by the Commissioner of IDEM.

79. This Order may be amended by mutual agreement of IDEM and the Respondent. Amendments shall be in writing and shall be effective when signed by the Commissioner of IDEM.

XXVI. EXTENSION OF TIME PERIODS

80. Any written response shall be deemed timely performed if hand delivered or postmarked by the last day of any time period prescribed herein. Whenever a party has the right or is required to do some act or make some response within a prescribed period after the service of a notice or other paper on him and the notice or paper is served upon him by mail, three

(3) calendar days shall be added to the prescribed period.

81. Whenever any party is called upon to respond or otherwise act in a certain number of days, and if the final day occurs on a Saturday, Sunday or legal holiday (whether State or national), such time limitation shall automatically extend to the next business day after such Saturday, Sunday, or holiday.

82. Any time periods specified in this Order may be extended only with the written approval of the Assistant Commissioner of the Office of Environmental Response or his designee.

XXVII. TERMINATION AND SATISFACTION

83. The provisions of this Order shall be satisfied when IDEM gives the Respondent written notice that the Respondent has demonstrated to IDEM's satisfaction that all of the tams of this Order, have been completed. This notice shall exclude the provisions of Section XVII, Record Preservation.

84. Nothing in this Order shall restrict the State of Indiana from seeking other appropriate relief to protect human health or the environment from pollution or contamination at or from this site not addressed in this Order.

XXVIII. LIABILITY INSURANCE

87. Prior to the commencement of any work under this Agreed Order, Respondent shall ensure that its contractor performing such work maintain General Liability insurance in the amount of at least One Million dollars ($1,000,000) per occurrence with an annual aggregate of at least Two Million dollars ($2,000,000). At least seven (7) days prior to the commencement of any work under this Agreed Order, Respondent shall certify to IDEM that the required insurance has been obtained by its contractor and/or subcontractors. Respondent shall provide IDEM with current copies of the Certificate of Insurance throughout the duration of the work perform [sic] under this Agreed Order.

XXIX. PRECEDENCE OF AGREED ORDER

86. In the event that conflict arises among the terms and conditions of this Order and those of the Statement of Work and the approved Removal Work Plan, this Order shall govern and the terms and conditions hereunder shall determine the parties' rights and responsibilities.

TECHNICAL RECOMMENDATION:	RESPONDENT
By: /s/ John M. Rose John M. Rose Assistant Commissioner Office of Environmental Response	By: /s/ John J. Easton John J. Easton President Raybestos Company
Date: 1/22/97	Date: 2/21/97
Attorney for IDEM	Attorney for Respondent
By: /s/ Catherine Gibbs Catherine Gibbs	By: /s/ Leonardo D. Robinson Leonardo Robinson
Date: 1/10/97	Date: 2-21-97

Approved and adopted by the Indiana Department of Environmental Management this 28th day of February, 1997.

/s/ Michael O'Connor
Michael O'Connor
Commissioner

STATEMENT OF WORK
REMOVAL ACTION
SHELLY DITCH
CRAWFORDSVILLE, INDIANA

Feb. 28, 1997

I. PURPOSE

The purpose of this Removal Action (RA) is to investigate the nature and extent of impacts at the Shelly Ditch site and to develop, evaluate, and implement alternatives, as appropriate. The objective of the RA will be to address human health and environmental concerns and bring the site to closure such that no further actions are required. For the purposes of the RA, the site is considered to be Shelly Ditch and its drainage basin, excluding the manufacturing and processing buildings of Raybestos Products Company (Raybestos).

Shelly Ditch is located in the northeast part of the city of Crawfordsville, Indiana. The ditch is approximately 5,500 feet long and receives storm water from various areas including residential, commercial, and industrial areas around the ditch. Facilities in the vicinity of the ditch include the Raybestos manufacturing plant and the DeKalb seed plant at the east end of the ditch; Crawfordsville Scrap and Salvage, a State Cleanup Site, at the west end of the ditch; the Montgomery County Highway Department garage north of the ditch; and the Crawfordsville Power and Light electric generating station at the west end of

the ditch. Shelly ditch runs through a residential area of approximately 17 houses, south of the Pleasant Meadow Pool (located west of Oak Street in the vicinity of Transect 23), and north of the Laura G. Hose elementary school (located east of Whitlock Street in vicinity Transect 20) and the County Fairgrounds (located east of Whitlock Street in the vicinity of Transect 12). The ditch runs north of city water wells #1 and #9 which are located west of Whitlock Street in the vicinity of Transect 6. Various other industrial and commercial facilities, including several transformers, are located within the area that the ditch drains.

Concentrations of polychlorinated biphenyls (PCBs) and lead have been detected in shallow sediments within Shelly Ditch. The PCBs were initially detected in Shelly Ditch sediments during sampling activities relating to the Crawfordsville Scrap and Salvage State Cleanup Site by the Indiana Department of Environmental Management (IDEM) in 1995 and 1996. Due to the implication of increasing concentrations with increasing proximity to the Raybestos property, Raybestos initiated an extensive sampling program in April of 1996 to evaluate the source and extent of PCBs in the ditch. The sampling program also included collection of samples for lead analysis. Additional rounds of sample collection were conducted in May and July of 1996 to further delineate the extent of PCBs in the ditch sediments. During these activities, Raybestos developed 5- and 100-year flood plain maps of the ditch as well as detailed

elevation contour maps. Throughout these activities, Raybestos has had ongoing discussions with the local citizens and the IDEM to keep them informed of progress and results of the investigation.

The sampling activities conducted by Raybestos in April, May, and July of 1996 have in large part delineated the extent of PCBs and lead in sediment within Shelly Ditch horizontally and vertically. After review of the sampling data, it was determined that limited, additional sampling would be required to verify the concept of PCB distribution within the ditch area. A Field Sampling Plan (FSP) and a Quality Assurance Project Plan (QAPjP) dated September 11, 1996, were prepared for this additional sampling and submitted to the IDEM. These supplemental sampling activities are ongoing.

The scope of project activities is provided in Section II. The project schedule is provided in Section III.

II. SCOPE

The overall technical approach depends upon many site specific characteristics which are still being collected. After a specific remedy is determined for the site, the details of the approach will be submitted to the Agency for approval in a Technical Memorandum.

The specific RA activities to be conducted at the Shelly Ditch site are segregated into eight separate tasks.

- Task 1 – Project Plans
- Task 2 – Community Relations
- Task 3 – Risk Assessment
- Task 4 – Engineering Evaluation and Ecological Screening
- Task 5 – Technical Memorandum
- Task 6 – Implementation
- Task 7 – Progress Reports
- Task 8 – Completion Report

Each of these tasks is described below.

Task 1 – Project Plans

The project plans will include a Work Plan which provides a project description and outlines the overall technical approach; a sampling and analysis plan (composed of the FSP and the QAPjP) for any additional work to be performed throughout the activities including project completion sampling; a health and safety plan; a data management plan; and a community relations plan (which will be prepared by the IDEM). The Work Plan will include a detailed schedule for implementing all tasks set forth in the Work Plan as well as event and deliverable submittal dates. This schedule will be provided in a comprehensive table/chart format included with the Work Plan. The plans are described below.

The Work Plan will be prepared outlining the activities to bring the project to closure. As part of this planning effort, the existing information (e.g. topographic maps, aerial photographs, data collected as part of IDEM's preliminary investigation, and data collected as part of any other investigation) will be compiled and briefly summarized. The background summary will include the following:

- *Local/Regional Summary.* A summary of the location of the site, pertinent area boundary features, and general site physiography, hydrology, and geology.

- *Nature and Extent of Constituents.* A summary of the conceptual understanding of the sources of impacts, potential routes of migration and potential human and environmental receptors and previous sampling activities. With the level of field data currently collected, additional sampling to delineate the extent of PCBs in sediment within Shelly Ditch is not anticipated.

- *History of Regulatory and Response Actions.* A summary of any previous response actions conducted by local, state, federal, or private parties.

- *Site Mappings.* A map of the site that includes topographic information and physical features on and near the site will be developed. The map will be prepared using photogrammetric methods. The map will contain topographic features and elevations relative to the National Geodetic Vertical

Datum of 1929. This map will be used as a base map for overlaying sampling locations and other necessary information. The map will illustrate all flood plains, water features, drainage patterns, tanks, buildings, easements, rights-of-way, and other features. The legal descriptions of the properties will be reviewed and property corners will be verified.

- *Potential Applicable or Relevant and Appropriate Requirements (ARARs).* ARARs associated with the project and the potential actions being contemplated will be evaluated. An outline identifying the permits that may be required and a schedule for obtaining such permits (or meeting the substantive requirements of said permits) will be included.

Sampling and Analysis Plan (SAP). The project manager, SECOR, will prepare a SAP which will consist of the following:

Field Sampling Plan. The FSP will specify and outline all necessary activities to perform any additional sampling that may be required including the collection of confirmation data. The FSP will clearly state sampling objectives; methods; necessary equipment; sample types, locations, and frequency; and analyses of interest. The schedule of events and deliverable submittal dates will be included in the detailed schedule provided with the Work Plan.

Quality Assurance Project Plan, The QAPjP will be written in accordance with the Indiana RCRA Quality Assurance Project Plan, which has been approved by the U.S. Environmental Protection Agency (EPA). The QAPjP will address all types of investigations conducted and will include the following discussions:

- A project description (will be duplicated from the Work Plan).
- A project organizational chart illustrating the lines of responsibility of the personnel involved in the sampling phase of the project.
- Quality assurance objectives for data such as the required precision and accuracy, completeness of data, representativeness of data, comparability of data, and the intended use of collected data.
- Sample custody. Any field sampling collection and analysis shall be documented in accordance with the chain-of-custody procedures as provided by the Indiana RCRA Quality Assurance Plan.
- The type and frequency of calibration procedures for field and laboratory instruments, internal quality control checks, and quality assurance performance audits and system audits.
- Preventative maintenance procedures and schedule and corrective action procedures for field and laboratory instruments.

- Specific procedures to assess data precision, representativeness, comparability, accuracy, and completeness of specific measurement parameters.
- Data documentation and tracking procedures.

Standard operating procedures for QA/QC that have been established by U.S. EPA will be referenced and not duplicated in the QAPjP. For the duration of this project, Heritage Laboratories, Incorporated of Indianapolis, Indiana is proposed performing chemical analysis of samples. IDEM would be notified of any change in laboratories used for the project. Any modifications to the QAPjP would also be identified along with this notification.

Health and Safety Plan (HSP). The project consultant will develop an HSP to protect personnel involved in site activities.

The plan will address all applicable regulatory requirements, contained in 29 CFR 1910 – *Occupational Safety and Health Standards* and 29 CFR 1926-1926 – *Occupational Safety and Health Regulations for Construction.* Refer to 29 CFR 1910.120 – *Hazardous Waste Operations and Emergency Response, Final Rule,* effective March 6, 1990, for specific guidance. Other guidance documents for reference include *U.S. EPA Standard Operating Safety Guides,* July 1988 and *Occupational Safety and Health Guidance Manual for Hazardous Waste Site Activities,* October 1985.

The plan will provide a site background discussion and describe personnel responsibilities, protective equipment, health and safety procedures and protocols, decontamination procedures, personnel training, and type and extent of medical surveillance. The plan will identify problems or hazards that may be encountered and how these are to be addressed. The HSP will also discuss site control methods to be implemented so that casual or proximate personnel (e.g., residents) are not affected by the activities. Standard operating procedures for ensuring worker safety will be included in the HSP. A copy of the HSP will be located on-site for reference.

Data Management Plan – The project consultant will develop a data management system including field logs, simple management and tracking procedures, and document control and inventory procedures for both laboratory data and field measurements to ensure that the data collected during the investigation are properly maintained.

Community Relations Plan (CRP). The IDEM will prepare a community relations plan on how citizens will be involved in the process based on interviews with community representatives and leaders.

The CRP will describe the types of information to be provided to the public and outline the opportunities for community comment and input during the RA. Deliverables, schedules, and staffing will be included in the plan.

Task 2 – Community Relations

Raybestos will assist IDEM in undertaking a community relations program. This program will be integrated closely with all activities to ensure community understanding of actions being taken and to obtain community input on RA progress. Community relations support provided by Raybestos may include the following:

- Revisions or additions to community relations plans, including definitions of community relations program needs for each activity.
- Preparation and dissemination of material designed to appraise the community of current or proposed activities.
- Arranging press conferences, workshops, and public and other informal meetings.
- Participating in joint briefings with the IDEM and the public.
- Analysis of community attitudes toward the proposed actions.

Deliverables and the schedule for submittal will be identified in the community relations plan discussed under Task 1.

Task 3 – Risk Assessment

Raybestos will retain a qualified consultant to prepare a baseline risk assessment of potential human health risks associated with lead and PCBs in Shelly

Ditch sediments. This effort will involve four components: constituent identification, exposure assessment, toxicity assessment, and risk characterization.

- *Constituent Identification.* This tasks selects constituents of issue to be evaluated as part of the risk assessment.
- *Exposure Assessment.* The risk assessment consultant will identify actual or potential exposure pathways, characterize potentially exposed populations, and evaluate the actual or potential extent of exposure.
- *Toxicity Assessment.* The risk assessment consultant will provide a toxicity assessment. This will involve an assessment of the types of adverse health or environmental effects associated with chemical exposures and adverse effects, and the related uncertainties.
- *Risk Characterization.* The risk assessment consultant will integrate information developed during the exposure and toxicity assessments to characterize the current or potential risk to human health and/or the environment posed by the site. This characterization will identify the potential for adverse health or environmental effects and identify any uncertainties associated with constituent(s), toxicity, and/or exposure assumptions.

Task 4 - Engineering Evaluation and Ecological Screening

A detailed engineering evaluation will be performed to determine the engineering controls and other activities required to implement the remedy. Such activities may include an evaluation of erosion control features, soil stabilization, and soil separation, and washing. This work will include calculation of velocities of flow through the ditch and the stability of the sediments in the ditch, as affected by the activities. In addition, the evaluation will include a discussion of ditch access considerations, installation of access roads and work staging areas, and other activities necessary to complete the activities. Work activities may also include elements such as a sediment transport analysis. An ecological screening will also be performed. The ecological screening activities will include a walkthrough inspection of the ditch to evaluate the presence of species and habitats that could be affected by the subject constituents. In addition, a literature search will be performed to evaluate if any potential sensitive species or habitats that could be impacted by the subject constituents. Findings of the ecological screening may determine that an ecological risk assessment must be conducted. If it is determined that an ecological risk is warranted, an addendum to the Work Plan will be provided outlining the process and time schedule for completing the ecological risk assessment.

Task 5 – Technical Memorandum

A Technical Memorandum will be prepared outlining the approach for the project. This report will document the following:

- The sampling performed to delineate the extent of constituents. This documentation will include a summarization and evaluation of validated data, preparation of summary maps and tables, and provision of the analytical reports in appendices.
- The results of the engineering evaluation. This documentation will include conclusions and raw data in appendices.
- A summary of the results of the risk assessment.
- Cleanup goals based on the conclusions of the risk assessment, ARARs, and any other appropriate information.
- An approach based on the conclusions of the engineering evaluation, risk assessment, ARARs, and any other appropriate information. The conclusions of the technical memorandum will include, as necessary, an excavation plan, delineation of areas to be excavated, staging areas for removed materials and removed material waste management and handling procedures, precautions for control of fugitive dust emissions, logistical considerations, permit requirements (if any), and restoration plans for residential properties and the site as a whole. The technical memorandum

will identify if supplemental revisions to the QAPjP and/or FSP are required, and if so, provide a schedule for submission of the necessary documentation.

- A performance standard verification plan (PSVP) detailing the protocol for ensuring that the cleanup goals have been achieved.

The Technical Memorandum will therefore state the approach to bring the project to closure. This approach will be implemented after approval of the Technical Memorandum by the IDEM.

Task 6 – Implementation

The approach identified in the Technical Memorandum will be implemented in accordance with the approved Technical Memorandum.

Task 7 – Progress Reports

Monthly reports will be prepared by the project consultant to describe the project progress. The monthly reports will include the following information:

- Status of work and the progress to date.
- Percentage of the work completed and the status of the schedule.
- Difficulties encountered and corrective actions to be taken.
- The activity(ies) in progress.

- Activities planned for the next reporting period.
- Any change in key personnel.

Task 8 – Completion Report

After the completion of activities, a report documenting the results of the activities will be prepared. The report will include a description of activities required to bring the project to closure, site and residential restoration activities, detailed documentation regarding completion sampling, and an overview of the project chronology. The summary of site restoration activities will include a description of methods to control erosion and a revised site topographic map. The documentation regarding completion sampling will include tables and figures summarizing data, data validation, data analysis, and copies of analytical reports provided in appendices.

III. PROJECT SCHEDULE

The schedule for the project is as follows subject to state and local responses and approvals. Any modifications to the project schedule will be made in writing to the IDEM for IDEM approval or denial.

Task	*Date*
Completion of Work Plan and submission of Work Plan to IDEM	15 days after finalization of the Agreed Order (AO)

IDEM Review of Work Plan and submission of comments to Raybestos	30 days after receipt of Work Plan from Raybestos
Raybestos finalization and submittal of Work Plan to IDEM	15 days after Raybestos receipt of IDEM comments.
Raybestos initiation of Work Plan	Within 15 days of receipt of IDEM approval of Work Plan
Completion of the Human Health Risk Assessment and submission of Risk Assessment to IDEM	November 15, 1996
Completion of Ecological Screening and Sediment Transport Analysis	30 days after approval of the Work Plan by the IDEM
Completion of Engineering Evaluation	30 days after approval of the Work Plan by the IDEM
Completion of the Technical Memorandum and Submission of Technical Memorandum to the IDEM	50 days after approval of the Work Plan by the IDEM
IDEM review of Technical Memorandum and submission of comments to Raybestos	30 days after receipt of the Technical Memorandum by the IDEM
Raybestos finalization and submission of Technical Memorandum to IDEM	15 days after receipt of comments from the IDEM regarding the Technical Memorandum

Implementation[1]	July 1, 1997, assuming IDEM approval of Technical Memorandum
Preparation and submission of Completion Report to IDEM	45 days after completion of activities.
IDEM review of Completion Report and submission of comments to Raybestos	30 days after receipt of Completion Report
Raybestos finalization and submission of Completion Report to IDEM	15 days after receipt of IDEM's comments
Progress Reports	By the 10th day of each month

[1] This item refers to actual ditch activities. It is recognized that prior to the actual ditch activities taking place, preparation will be required (e.g., construction of access roads, equipment staging, etc.). To the degree necessary, as much of these preparation activities will be implemented prior to the July 1, 1997 start date.